

# **Exhibit 3**

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UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

-----X  
FARHAD AZIMA, :  
 :  
Plaintiff, :  
 :  
v. :Civil Action No:  
 :  
 :20-cv-954  
NICHOLAS DEL ROSSO and VITAL :  
MANAGEMENT SERVICES, INC., :  
 :  
Defendants. :  
-----X

ORAL ARGUMENT HEARING  
TUESDAY, JANUARY 16, 2024  
3:00 P.M.

Job No.: 522088  
Pages 1 - 163  
Reported by: Adrienne Mignano, RPR

1                    Oral Argument Hearing held via Zoom  
2                    videoconferencing before Adrienne M. Mignano, a Notary  
3                    Public and Registered Professional Reporter in and for  
4                    the State of New York.

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A P P E A R A N C E S

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1 MS. RICHEY: I will put on the record  
2 what we're here to do.

3 So my name is Alice Richey, and I'm  
4 the special master appointed by Judge Osteen in  
5 the case.

6 Do you have the case caption, by the  
7 way, Madam Court Reporter?

8 THE COURT REPORTER: Yes.

9 MS. RICHEY: Okay. And we are here  
10 today for a hearing and oral argument on the  
11 following motions:

12 The first is plaintiff's motion to  
13 compel defendants to search their laptop and  
14 other sources for responsive information.

15 The second is plaintiff's motion to  
16 compel defendants to produce documents relating  
17 to CyberRoot.

18 The third is plaintiff's motion to  
19 compel defendants to produce information  
20 improperly withheld for privilege.

21 The fourth is plaintiff's motion to  
22 preserve defendant, Del Rosso's testimony for  
23 trial.

24 And the fifth is defendant's motion  
25 to compel plaintiff to identify his trade

1 secrets.

2 And we're going to take those in  
3 approximately that order. I will ask the  
4 plaintiff and defendants to argue the first and  
5 second motions together, to the extent they  
6 could, because I think those arguments are  
7 related.

8 I'd also ask that the parties  
9 designate one lawyer to argue on behalf of each  
10 issue, not necessarily each motion, and I'm  
11 hopeful that can be done. Obviously, the reason  
12 to do that is to make us have an efficient  
13 hearing.

14 So before I hear from the plaintiffs  
15 on the first motion, just at the outset, I want  
16 to let you know, on that motion, I have a couple  
17 of questions that I hope will be answered by  
18 somebody with respect to the first motion. And  
19 that is, the first one is a simple one, which is  
20 where is the laptop? I can't tell whether it is  
21 in the United States or the UK. And who has  
22 custody, possession or control? Those might be  
23 different, but I'd like to know the answer to  
24 that.

25 The defendants refer to a UK process

1 that needed to be followed in connection with  
2 the laptop, and I'd like to understand that  
3 process, the details of it, what it involves,  
4 how long it will take, et cetera.

5 And then in connection with the other  
6 sources part of that motion -- and this would be  
7 true for some of the other motions -- I want to  
8 have some specifics as to which request for  
9 production have not been responded to. So if  
10 the plaintiffs allege the defendants haven't  
11 fully responded to discovery requests, I would  
12 like to know what they are.

13 I know you have attached some of your  
14 discovery requests, but I need you to tell me  
15 what you believe has not been fully responded  
16 to, kind of chapter and verse on that, so I can  
17 rule appropriately.

18 In connection with the motion to  
19 produce documents -- to compel defendants to  
20 produce documents relating to CyberRoot, I have  
21 the same question in terms of the specific RFPs  
22 that have not been answered.

23 And then with respect to the  
24 defendants, the defendants stated that they have  
25 conducted various searches of VMS and Del Rosso



1 to date.

2 I'm curious if, in the responses to  
3 the discovery requests, whether defendants have  
4 said specifically that they have conducted those  
5 searches and there is no further documents to  
6 provide. In other words, sometimes there will  
7 be answers to discovery and it is not clear to  
8 the party that has submitted the discovery  
9 questions that whoever is responding is saying,  
10 we don't have anything else. And sometimes it  
11 looks like they just haven't searched. So if  
12 that's a distinction that matters, I'd want to  
13 know about that.

14 Okay. So that's my questions for  
15 now. I might have some, obviously, as you go  
16 along. But I'd like to start with hearing from  
17 the plaintiffs on this motion -- these two  
18 motions rather.

19 And keep in mind -- and I said I'd  
20 stop talking, I want to say one other thing. I  
21 have read everything you have given me. And I  
22 have also looked through the record on Pacer and  
23 read what I believe would be important things to  
24 read, most of which you also gave me. So when  
25 you argue, know that I have read it. Obviously,

1 if you want to highlight something for me or  
2 clarify something, please do that.

3 Okay. I'll stop talking. And I'm  
4 going to -- I'd like to not start out with you  
5 have to stop in ten minutes and things like  
6 that. But go ahead and start. I think these  
7 arguments can be brief, given the number of  
8 motions we have and given how well you've  
9 briefed it. But I do want to hear from you.  
10 And if we need to -- I need to kind of stop and  
11 give the other party a chance to respond, I'll  
12 do that. Okay.

13 MS. BRIGGERMAN: Sure. Thanks,  
14 Ms. Richey. And this is Lauren Briggerman on  
15 behalf of plaintiff. And I want to start with a  
16 little bit of context to highlight what we  
17 provided in our initial submission because I  
18 think it is very relevant to these motions.

19 This case has been pending for more  
20 than three years. And at every turn, defendants  
21 have resisted producing documents. You asked  
22 which RFPs defendants have failed to  
23 substantively respond to. And we'll identify  
24 those with specificity, but sadly, I think by  
25 and large, they have failed to respond to most

1 of them. They have failed to produce any  
2 meaningful discovery. Most of what they have  
3 produced to plaintiff is his own HAPS data,  
4 which they have had in their possession. And  
5 they've produced very little of their own  
6 custodial documents. And they've produced very  
7 little since August 8th, when the Court ordered  
8 them to produce responsive documents and found  
9 that our discovery requests were relevant. And  
10 nothing has been produced since the hearing on  
11 September 29th. So I think that context is  
12 important.

13 And you also asked whether the issue  
14 is whether defendants have failed to search or  
15 not. I think that is one question. Another  
16 issue is how they are interpreting what is  
17 relevant to this case. That is subject to a  
18 motion that we will be filing later, but I think  
19 it is relevant. They have had an overly narrow  
20 cramped view as to what is relevant in this case  
21 and failed to produce documents accordingly.

22 And I think we need to be mindful of  
23 all of the deadlines that have lapsed so far.  
24 Discovery first closed in June. There was a new  
25 document production deadline in December.

1 Still, we have gotten no documents. And fact  
2 discovery closes in March. So time is of the  
3 essence here.

4 And we are very careful to think  
5 about the motions that were the most important  
6 and efficient to get in front of you, and I  
7 think we have chosen those today. So I will  
8 jump right into the first motion, and that is on  
9 the searching of relevant sources of data.

10 So defendants have failed to search  
11 all relevant sources of data. And I think they  
12 effectively admit that in their response. And I  
13 can go through some of the categories here that  
14 they've identified and describe for you why they  
15 have failed to search them.

16 VMS is one of the defendants in this  
17 case. It is a corporate entity. And there are  
18 numerous e-mail addresses associated with VMS  
19 and potential custodians as well. Defendants  
20 have said that Mr. Del Rosso is the only  
21 individual who has done any work for VMS. His  
22 wife was an employee, but she did no work.

23 It sounds to me like what they are  
24 saying is they did not search for  
25 Mrs. Del Rosso's e-mails. That's problematic.

1           We also know through discovery that  
2           there are at least three other individuals who  
3           have Vital Management e-mail addresses. And  
4           they are Cynthia Sierra, Frank Cruz and Craig  
5           Evers. But defendants have suggested that they  
6           have only searched for one e-mail address  
7           associated with Mr. Del Rosso, and that's  
8           ndr@vitalmanage.com. So right away, they admit  
9           that they have not searched all of the relevant  
10          VMS e-mails.

11           Mr. Del Rosso admitted that he used  
12          text messages such as Signal to communicate for  
13          work. And again, we have received no text  
14          messages or Signal messages, any sort of online  
15          or app messaging that he may have used on his  
16          phone.

17           Del Rosso also admits that he has  
18          multiple e-mail addresses, and it appears that  
19          they have only searched one e-mail address  
20          because they argue it's his primary e-mail  
21          address. But again, what reasonable steps were  
22          taken to search all of the other e-mail  
23          addresses?

24           Mr. Del Rosso has admitted during his  
25          deposition that he possesses documents that are

1      facially relevant to this case, and yet  
2      defendants have not produced any of these. And  
3      some of these categories of documents we have  
4      not received are old financial records.

5                 Now, defendants will point to the  
6      bank records that we received through a  
7      third-party subpoena. Not because defendants  
8      produced bank records, but because we obtained  
9      them through a subpoena. But bank records are  
10     not the entirety of financial records that we  
11     requested.

12                Calendar appointments, he's admitted  
13     that he used Outlook. We have received no  
14     calendar appointments, for example, for meetings  
15     with Mr. Gerrard of Dechert that we know he  
16     attended, or meetings with law enforcement where  
17     he provided our client's stolen data.

18                Travel records, reports that  
19     Mr. Del Rosso prepared for Dechert as part of  
20     his engagement.

21                Receipts for invoices.

22                The Project Nariman files. He has  
23     admitted that Project Nariman is the name for an  
24     investigation that relates to Mr. Azima, and he  
25     has failed to produce those files and travel

1 records.

2 So these are just some of the things  
3 that we have not received from defendants.

4 And as I flagged earlier, this may  
5 relate in part to their overly narrow definition  
6 of what is relevant to this case. They seem to  
7 think that the standard for relevance is whether  
8 it is something that supports our argument that  
9 Mr. Del Rosso hacked our client's files, and  
10 that's simply not the standard.

11 So I think what we need to determine  
12 today is, are they withholding documents based  
13 on their narrow view of relevance, which is  
14 improper? Do they no longer have certain  
15 documents? And that raises questions about  
16 potential spoliation. Or are they simply  
17 refusing to provide them?

18 And then just quickly on the laptop,  
19 I did want to address that. Our position is  
20 that the laptop is in Mr. Del Rosso's custody  
21 and control. It is a laptop that he admitted he  
22 used for work. It his laptop. It is in his UK  
23 counsel's possession in Europe right now, in the  
24 UK right now.

25 Our understanding -- or we know that

1 Mr. Rosenthal, from Nelson Mullins has attended  
2 hearings in the UK related to the laptop. And a  
3 question for him would be whether he has  
4 impressed upon that court that we have discovery  
5 deadlines in this case and that he is required  
6 to search that laptop for Mr. Del Rosso's  
7 responsive documents.

8 I'll pause right there for any  
9 questions. And I didn't know, Ms. Richey, if  
10 you wanted to -- I'm happy to go on to the next  
11 motion, or if you wanted defendants to respond  
12 here --

13 MS. RICHEY: Let's have the  
14 defendants respond on this particular question.  
15 And I would specifically like to hear about the  
16 laptop. The other thing I know I'm going to  
17 want is, I would like to know a list of the  
18 exact RFPs. I presume these are all RFPs --  
19 there might be interrogatories too -- and what  
20 you asked and what the response was. And that  
21 way I can determine whether I agree or disagree  
22 that the responses have not been fulsome.

23 Just FYI, for purposes of my rulings,  
24 I'm going to go with, obviously, what  
25 Judge Osteen said or Judge Webster said -- and I



1 think Judge Osteen may have said it again --  
2 that the time frame is March 2015 to  
3 October 15th, 2020. So there shouldn't be any  
4 question about the temporal scope of your  
5 discovery.

6 Okay. So let's -- with that, let me  
7 hear from the defendants.

8 MR. BRANCH: Thanks, Ms. Richey.

9 To give somewhat of a similar  
10 overview here, we've been at this -- and we  
11 would disagree wholeheartedly with this argument  
12 that the defendants have not made fulsome  
13 discovery responses in this case. We have spent  
14 countless hours producing documents -- searching  
15 for documents, producing records, providing  
16 testimony only to be met every time with an  
17 argument that, well, that's not enough; that's  
18 not enough; that's not enough.

19 And the reality of the cycle that we  
20 are in at this point is, that the plaintiff is  
21 convinced that the defendants hacked his  
22 information and posted it publicly, but that  
23 didn't happen. And so the plaintiff, through  
24 his discovery request, is searching for  
25 discovery responses and evidence, which does not

1     exist. And so every time defendants get a  
2     discovery request seeking evidence of hacking of  
3     Mr. Azima and that information is not produced,  
4     we are met with accusations of hiding  
5     information, not fully responding to discovery  
6     requests and additional requests for information  
7     and requests for testimony.

8                 So where does that put us? As  
9     everyone is aware, the 2015 Federal Rules of  
10    Civil Procedure were amended to add in a  
11    proportionality requirement. Rule 26(b)(1)  
12    requires the Court to consider proportionality,  
13    which is based on the importance of issues at  
14    stake in the action, the amount of controversy,  
15    the parties relative access to information,  
16    resources, the importance of discovery resolving  
17    the issues and whether the burden or expense of  
18    the discovery outweighs its likely benefit.

19                Now, Judge Webster and Judge Osteen  
20    have recognized that limited discovery into the  
21    hacking can be relevant to the remaining claims,  
22    but this is hardly a license to turn the case  
23    back into the hacking case that was dismissed by  
24    the district court.

25                I know the plaintiff may be

1     frustrated by the lack of evidence of hacking,  
2     which is understandable since our client didn't  
3     hack him, but that doesn't give him a license to  
4     engage in a review of every possible source of  
5     information, as if the issues had never been  
6     narrowed.

7             This has resulted in this constant  
8     loop of discovery requests, responses,  
9     accusations and additional discovery requests.  
10    And these motions and our responses today  
11    demonstrate why we are at the point of the  
12    discovery that is being sought by the plaintiff  
13    outweighing its benefit to the case.

14            Second, courts recognize that where,  
15    as here, the Court is reviewing discovery in a  
16    trade secret case, the first thing that is  
17    supposed to happen is that the plaintiff must  
18    show that he has a trade secret, which was also  
19    misappropriated. Only then, if a plaintiff can  
20    do so, are they supposed to get discovery under  
21    North Carolina law.

22            Now, we cited several cases in our  
23    papers that reflect that important precept. And  
24    it may seemingly be lost in the list of motions  
25    today, but we would respectfully urge you to

1 withhold any ruling on plaintiff's discovery  
2 until we get a chance to show that they have  
3 failed to prove any trade secrets that were  
4 published or misapplied by defendants.

5 And as such, it is grossly improper  
6 to allow the plaintiff to turn over every nook,  
7 cranny and pebble in support of their dismissed  
8 hacking claim, while at the same time avoiding  
9 discovery into all of their trade secrets that  
10 they say have been misappropriated.

11 Now, Ms. Richey, you focused -- the  
12 first question I think you had for the parties  
13 was about the laptop. And this is the United  
14 Kingdom laptop, not the laptop that  
15 Mr. Del Rosso used for work here in the United  
16 States.

17 This is a computer that Mr. Del Rosso  
18 used when he worked in the United Kingdom, left  
19 over there several years ago, shortly before he  
20 was diagnosed with cancer, and has not been back  
21 over to the United Kingdom since -- or at least  
22 did not go back over to the United Kingdom to  
23 retrieve the laptop due to him getting sick.

24 In the meantime, the Stokoe law firm  
25 somehow came into possession of the laptop,

1       didn't inform anyone that it had possession of  
2       the laptop for a number of months until it  
3       became subject of what I believe is called an  
4       offer-up proceeding in the United Kingdom.

5               The offer-up proceeding resulted in  
6       an order on July 31st of last year, whereby the  
7       Court ordered that my client's offer-up claim as  
8       to the laptop was allowed. The court set a  
9       specific procedure by which the laptop was to be  
10      reviewed and what was to occur during that  
11      review process. And we can share a copy of that  
12      order. What I would like to do is to see if I  
13      can share part of my screen.

14             MS. RICHEY: Have plaintiffs seen  
15      this order? I presume so.

16             MR. BRANCH: Yes, ma'am.

17             MS. RICHEY: Okay.

18             MS. BRIGGERMAN: If this is from the  
19      UK court case, probably. I don't know what he  
20      is about to put on the screen.

21             MR. BRANCH: Yeah, Mr. -- plaintiff  
22      is a party to the UK case.

23             MS. BRIGGERMAN: Correct.

24             MR. BRANCH: This is -- so the Court  
25      can see, this is the beginning of the caption of

1 the order. The date at the top is July 31, '23.  
2 The first caption is the main case in the United  
3 Kingdom, Ras Al Khaimah Investment Authority v.  
4 Azima, claimant and defendant, and then you have  
5 the additional defendants, the counterclaim,  
6 Neil Gerrard, Dechert, LLP and James Edward  
7 Dennison Buchanan.

8 And then you have a number of other  
9 cases that are cited herein, in which parties  
10 had a claim related to the laptop that was  
11 subject to the offer-up proceeding. This is the  
12 order that the Court entered, setting the  
13 parameters on what was to be done with the  
14 laptop.

15 I've directed the Court's attention  
16 to the last paragraph on page 3, which is the  
17 representation that my client's lawyers,  
18 Rosenblatt-- or solicitors Rosenblatt made  
19 pursuant to which the Court entered the order.  
20 And it includes a representation that Rosenblatt  
21 will not access or examine the laptop or the  
22 diligence image, which is the image of the third  
23 party that Stokoe used to image the laptop prior  
24 to the steps set out in paragraph 4 of the order  
25 having been completed. So Rosenblatt can't

1 access the image until the analysis contemplated  
2 by paragraph 4 of the order is completed.

3 That Rosenblatt is to retain securely  
4 within the jurisdiction the laptop and the  
5 forensic image of the laptop, that they will not  
6 supply the laptop the diligence image, the  
7 forensic image, or any of the other media, to  
8 the Del Rosso parties until the resolution of  
9 the disclosure applications that are  
10 contemplated by this order as well.

11 And, your Honor, we will submit this  
12 order to you, but it cites here -- paragraph 4  
13 of this order, if we scroll down. Paragraph 4  
14 here contemplates Rosenblatt's instruction of an  
15 independent forensic IT specialist to examine  
16 the media at issue and prepare an independent  
17 forensic report. Our understanding, as of  
18 several days ago, is that the independent  
19 forensic group has possession of the laptop, but  
20 has not produced the report yet.

21 Rosenblatt, the defendants' UK  
22 lawyers, does not have possession of the laptop.  
23 And in any event, under this order, even if they  
24 had possession of the laptop, until the  
25 application process called for by this order is

1 worked through, we're not sure that we can  
2 search the laptop for responsive information.

3 And so that all being said, we agree  
4 that the laptop needs to be searched for  
5 responsive information. I mean, that is -- that  
6 is not something that the parties disagree on  
7 and it is something that we represented to  
8 Judge Osteen at the September 29th hearing.

9 The challenge that we have is that  
10 the laptop is subject to a court order and a  
11 review process, where there is a third party who  
12 says that he has privileged information on the  
13 laptop. He wants it pulled out of the laptop  
14 before anybody else gets to look at it. And  
15 that's one of the main reasons why it is going  
16 through that process.

17 MS. RICHEY: Moore International Law  
18 Firm; I saw a reference there.

19 MR. BRANCH: Rosenblatt.

20 MS. RICHEY: Rosenblatt? Who is  
21 Rosenblatt?

22 MR. BRANCH: Rosenblatt is the  
23 solicitors that represent Vital Management and  
24 Del Rosso in the United Kingdom.

25 MS. RICHEY: No, I was referring to



1 the third party that believed they had  
2 privileged information. Was that -- I thought  
3 it referenced Moore -- okay.

4 MR. BRANCH: That is a gentleman by  
5 the name of Mr. Moore.

6 MS. RICHEY: Okay. But Rosenblatt is  
7 the attorney for Mr. Del Rosso and VMS in the  
8 UK, right?

9 MR. BRANCH: Yes, ma'am. That is  
10 correct.

11 MS. RICHEY: Just kind of reading  
12 that order at first glance, it looks like that  
13 has not been complied with in terms of timing.

14 Do you know why?

15 MR. BRANCH: I cannot speak as to the  
16 reason for exactly why it has taken as long as  
17 it has taken for the forensic analysis to be  
18 done by the independent forensic team in the  
19 United Kingdom.

20 MS. RICHEY: Okay. Does  
21 Mr. Rosenblatt know that this lawsuit here is  
22 time challenged and that this information has  
23 been requested in this lawsuit, that is, a  
24 review of the laptop has been requested in this  
25 lawsuit?

1 MR. BRANCH: My understanding is that  
2 we have been in communication with the  
3 Rosenblatt firm to get status updates, given  
4 the -- given the request the plaintiff has  
5 lodged in this lawsuit.

6 I mean, have we filed a motion to  
7 compel the expert in the case in the UK to  
8 finish? I don't believe so.

9 MS. RICHEY: No. I'm not suggesting  
10 that, of course. My thinking, though, is that  
11 if Mr. Rosenblatt is the attorney for  
12 Mr. Del Rosso and VMS, that Mr. Del Rosso,  
13 through you or on his own, can direct him to  
14 push to get this done so that the laptop can be  
15 returned to his possession. He doesn't have to  
16 tell him why, but it's his attorney. And in my  
17 view, he ought to tell him, you need to get this  
18 done. And I think the attorney needs to know  
19 that there is a process going on in the United  
20 States in which that laptop is implicated.  
21 Because, you know, it may not be important to  
22 get it done timely there, but it is important to  
23 get it done timely here.

24 MS. BRIGGERMAN: Ms. Richey, if I may  
25 add, Nelson Mullins has been attending those

1       hearings on behalf of Mr. Del Rosso. So I would  
2       assume and hope that they have been making that  
3       point at court. But given the delays here, I'm  
4       not sure that that is the case.

5               MS. RICHEY: Well, and whether or not  
6       it has been -- and I'll put this in what I  
7       finally decide -- it does seem to me that  
8       because Mr. Del Rosso, these are his attorneys,  
9       he can and should direct them to have this  
10      process hastened and done as quickly as  
11      possible. And whatever -- again, I don't know  
12      what impediments are in the way and why it  
13      hasn't been done to date, but he can certainly  
14      direct them to do that. And I would like him to  
15      do that.

16             I was just glancing through the  
17      order. And I don't know the answer to this, but  
18      is there anything in the order that prohibits a  
19      copy of the laptop being provided to  
20      Mr. Del Rosso, given that it is his laptop?  
21      Does anyone know the answer to that?

22             MR. BRANCH: So, yes. The short  
23      answer is yes, because there is an allegation  
24      that the image of the laptop contains privileged  
25      information of a third party. And so there is a

1 representation made that Rosenblatt will not  
2 supply the laptop, the diligence image, the  
3 forensic image, any dedicated media or any  
4 mixed-up media to the Del Rosso parties until  
5 the resolution of any disclosure applications  
6 pursuant to CPR 31.17.

7 MS. RICHEY: And does that preclude a  
8 copy? I heard the things that already exist  
9 they can't turn over. Does that preclude  
10 another copy being made?

11 MR. BRANCH: I think so. I think the  
12 only -- I would have a hard time interpreting  
13 the order a different way. Because the purpose  
14 of this -- the purpose of the process, in my  
15 understanding, is to examine the image of the  
16 laptop, determine whether there is privileged  
17 information on it that is not Mr. Del Rosso's  
18 privileged information on it and remove it from  
19 the laptop prior to anyone else seeing it so  
20 that you can keep the confidentiality prong of  
21 the privilege intact.

22 And an interpretation of this order  
23 that says, oh, well, they keep an image, but we  
24 get an image too, I'm concerned it would defeat  
25 the purpose of what this order is attempting to

1 accomplish. And so --

2 MS. RICHEY: Well, I think this: You  
3 can send me the order and I can look at it. If  
4 it is not clear on that point, then one of the  
5 things that might make sense for us, since  
6 everybody agrees that the laptop needs to be  
7 searched, is for Mr. Del Rosso to inquire about  
8 that and the Court or the lawyer, whoever, may  
9 say no. And if it is not clear in the order,  
10 then that might be a question for the judge over  
11 there. But I think that is a question that  
12 ought to be asked.

13 As I understand it, hearing  
14 everybody, everybody agrees we need to get the  
15 laptop, we need to search the laptop for  
16 relevant information. So let's do what we can  
17 do to hasten that and get that back into his  
18 control.

19 I guess another option -- well, let's  
20 start there. Okay. And I'm not ruling, I'm  
21 just sort of musing out loud about things we can  
22 do. And I'll incorporate those later into an  
23 order.

24 MS. BRIGGERMAN: My understanding is  
25 that once the stolen data on the laptop is

1 removed, that an image can be made. There is  
2 nothing restricting that. And so if an image is  
3 what Del Rosso's lawyers need so that they can  
4 efficiently and expeditiously search the laptop,  
5 then they can do that.

6 MR. BRANCH: I don't know that I read  
7 the order the same way. The order contemplates  
8 the -- there is an application process that  
9 takes place after the image. The forensic  
10 report is produced. The image goes back to  
11 Rosenblatt.

12 But in any event, I mean, our  
13 position is that the order governs, and we're  
14 going to get an image as soon as we're allowed  
15 to in the UK proceeding. And we'll certainly  
16 reach out to Rosenblatt and ask them to, you  
17 know, do what they can to expedite the process.

18 And if there is a difference in  
19 interpretation of the United Kingdom order, I'm  
20 happy to listen to it. But at this point, you  
21 know, I know our client is not -- it wants to be  
22 careful to not get crosswise with the Court and  
23 do something that is not -- I mean, frankly,  
24 remediable if you disclose information that  
25 you're not supposed to disclose.

1 MS. RICHEY: Okay. So what we'll do  
2 is, you'll send the order and I'm going to look  
3 at it. And I will write something when I write  
4 my decision that will more than likely include a  
5 directive to Mr. Del Rosso to direct his  
6 attorneys to move that process along. I'll come  
7 up with some language to that effect.

8 But also to have them report to him.  
9 And then you can report to me and the other  
10 side, the timing and when it is likely to be  
11 released to him.

12 Okay. Anything else on the laptop?

13 MR. BRANCH: Not from defendants.

14 MS. RICHEY: Okay. And anything  
15 else -- I know you addressed the RFPs and the  
16 general claim of failure to produce documents.

17 Anything else you want to say about  
18 that? I told you we'll talk about trade  
19 secrets, and we will.

20 MR. BRANCH: Look, when this lawsuit  
21 was filed, we imaged our client's work computer.  
22 We imaged our client's work e-mail account. We  
23 imaged our client's iCloud account, which is the  
24 backup of his cell phone and his iPad. We got  
25 our client to collect his removable media, and

1 we made that part of the -- we copied it and we  
2 made it part of the universe of documents that  
3 we searched.

4 And when Judge Webster's order was  
5 entered, I believe, on July 25th, we had 14 days  
6 to search all of that information for responsive  
7 material. And we did it.

8 And so we -- I disagree with  
9 Ms. Briggerman's characterization that we, you  
10 know, must have applied unnecessarily  
11 restrictive search terms because you didn't give  
12 us documents. Well, the reality is that a lot  
13 of -- if items don't exist, they can't be  
14 produced. And the assumption the plaintiff has  
15 baked in to these motions seeking discovery, is  
16 that our clients did all of these bad things  
17 with third parties. There must be evidence of  
18 these bad acts. And you're playing some sort of  
19 shell game to hide them from producing them to  
20 us. That is not what is happening.

21 MS. RICHEY: Do the parties agree on  
22 search terms? Was that part of your  
23 protective --

24 MR. BRANCH: We did not agree on  
25 search terms.



1 MS. RICHEY: Okay.

2 MR. BRANCH: Judge Webster's order  
3 gave us 14 days to produce. Frankly, we came up  
4 with search terms, I think, with -- and started  
5 running them in less than 24 hours. The search  
6 terms that we came up with were derived from  
7 plaintiff's own request for production of  
8 documents.

9 We were able to categorize the  
10 requests for production of documents into, if I  
11 remember right, three general categories,  
12 depending on some of the qualifiers that the  
13 various requests for production had, and then  
14 identified responsive documents there.

15 And the buckets of information that  
16 we were able to identify that were responsive  
17 was -- the first large bucket was the  
18 information of Mr. Azima's that was posted on  
19 the Internet and downloaded via BitTorrent.  
20 That was -- the vast majority of the hits that  
21 we had came from that.

22 We had already produced that  
23 information to plaintiff in a previous  
24 production. But we ended up -- but we hadn't  
25 Bates-stamped it. We produced it to them as we

1 had it. And so we reproduced it with Bates  
2 numbering as part of the post July 25th order  
3 process.

4 We also went through and searched our  
5 client's e-mail account, our client's iPhone --  
6 or iCloud records, and our client's electronic  
7 file backups for responsive information. And if  
8 we had hits on the applicable search terms, the  
9 documents were reviewed for responsiveness.  
10 Then after they were reviewed for  
11 responsiveness, we reviewed them for privilege,  
12 logged them, if there was a privilege hit. And  
13 then made the production pursuant to  
14 Judge Webster's order.

15 We provided a very detailed privilege  
16 log and amended our privilege log, I think, two  
17 and-a-half weeks later to remove a number of  
18 documents from the log and produce the documents  
19 that we determined on a quality control review  
20 should not have been part of the assertion of  
21 the privilege. And so we've gone through all  
22 this material.

23 Now, with respect to some of the  
24 specific issues that are listed in the order,  
25 we've covered the work computer. The work

1 computer was imaged -- it was imaged around the  
2 time the lawsuit was filed, at or within a month  
3 after the lawsuit was filed, I believe.

4 The iPhone was also imaged within a  
5 month or two of the lawsuit being filed -- the  
6 iPhone and the iPad through the iCloud account  
7 backup.

8 Mr. Del Rosso's e-mail account was  
9 searched for the applicable period of time. And  
10 there has been some -- Mr. Del Rosso testified  
11 that he used or had other e-mail accounts, but  
12 he also testified he only used his Vital  
13 Management e-mail account to conduct business on  
14 there.

15 He has reviewed his other e-mail  
16 accounts and there is not responsive e-mails  
17 contained in those accounts. I mean, there's,  
18 you know, throwaway accounts that he used for,  
19 like, shopping, for example. It is just not the  
20 accounts that he used to conduct his work.

21 The motion cites to banker's boxes of  
22 hard documents. We've gone through those  
23 documents. Those were printouts of electronic  
24 documents. And we've -- you know, we made sure  
25 that to the extent that he had hard copies of

1 documents, they were copies of electronic  
2 documents that were a part of the review  
3 process.

4 Similarly, with regard to external  
5 hard drives or thumb drives in the collection  
6 process after the lawsuit got filed, we made  
7 sure that that collection process encompassed  
8 external hard drives or thumb drives that may  
9 have responsive information. And those were  
10 copied, put into the database, and searched for  
11 responsive information.

12 And so I think -- it seems that we  
13 are more in an area where there may be  
14 disagreement over the -- because we haven't  
15 agreed on search terms, what search terms needed  
16 to be used, and how to interpret those search  
17 terms as opposed to the universe of hardware  
18 that should have been searched.

19 MS. RICHEY: Did you all have any  
20 agreement on temporal parameters for the  
21 searches? What parameters did you use?

22 MR. BRANCH: We used the parameters  
23 from Judge Webster's order. Yes, ma'am.

24 MS. RICHEY: Okay. Well, it seems  
25 that -- I understand you have produced a lot of

1 information and I hear that. I think the  
2 question for me is whether the defendants have  
3 fully responded to existing requests for  
4 production of documents.

5 I don't -- are there any  
6 interrogatories that the plaintiffs believe --  
7 plaintiff believes have not been fully responded  
8 to or was it just document requests?

9 MS. BRIGGERMAN: Yes, it's  
10 interrogatories as well, and we can identify  
11 those. And I believe there is a set that is  
12 actually due today. But we have two sets of  
13 interrogatories that have been responded to, and  
14 we find those to be willfully inadequate.

15 But if I may step back just a minute,  
16 Ms. Richey. You said something that I just want  
17 to clarify. You suggested that defendants have  
18 produced a lot of documents, and that's not the  
19 case.

20 As Mr. Branch said, defendants only  
21 really began searching for documents after the  
22 Court ordered them to do so in July of 2023. We  
23 first served RFPs in November of 2022. They  
24 asked for an extension to respond. We gave them  
25 an extension. And once that deadline passed,

1 they didn't produce documents.

2 They then produced only our client's  
3 hacked data.

4 They later produced, in May of 2023,  
5 eight documents.

6 And only since the Court ordered them  
7 to respond to our RFPs in July, did they  
8 actually make two small productions.

9 So I don't want the special master to  
10 think that they have been producing a voluminous  
11 amount of documents and they have been  
12 conducting a rigorous search for documents.  
13 That's not the case.

14 I also do think there is a  
15 fundamental dispute over what is relevant here.  
16 They believe the standard is that if a document  
17 doesn't support our theory of the case, that  
18 Mr. Del Rosso hacked our client, then they don't  
19 have to turn it over. And that's just simply  
20 not what the discovery standard is.

21 MS. RICHEY: So what -- what --

22 MR. BRANCH: Ms. Richey, can I jump  
23 in here, please?

24 MS. RICHEY: Very briefly.

25 MR. BRANCH: So A, I -- just, I think

1 Ms. Briggerman missed what I just said. We  
2 designed our queries around the discovery  
3 requests. We searched for responsive documents  
4 based on the discovery requests. We did not  
5 apply a unilateral view of what's relevant and  
6 what's not.

7 And this idea that we didn't search  
8 for documents prior to Judge Webster's order has  
9 two bases.

10 One, is the fact that Judge Webster's  
11 order expanded the scope of discovery beyond  
12 what we thought it should have been.

13 The second basis is where we thought  
14 discovery was appropriate was as to the  
15 republication claim in the trade secrets, of  
16 which my clients had nothing to do with. We  
17 searched for documents related to the  
18 republication of trade secrets in 2018. My  
19 clients don't have anything related to it  
20 because they were not involved in it.

21 So this idea that we did nothing  
22 prior to the July 25th order is a misstatement  
23 of the way that this case has been litigated.

24 MS. RICHEY: So thank you all for  
25 that. I think what I -- and again, I'll follow

1 this up with a writing to you.

2 But what I would like to know from  
3 the plaintiff is, I'd like to have a list of the  
4 specific requests. Go ahead and just do a  
5 document for me that has an inventory and tell  
6 me what their response is. And then if there is  
7 a particular objection -- I don't know how you  
8 did objections. Did you do objections specific  
9 to each interrogatory? I'm assuming you did  
10 general objections that you would argue and  
11 apply to each response.

12 MR. BRANCH: I don't think we  
13 asserted any general objections. We did request  
14 by request objections.

15 MS. RICHEY: Great. That's helpful.  
16 So I would like to have included in that  
17 response -- and this is verbatim. I don't want  
18 anybody to add to it. Just, what is the  
19 request? What was the response, including the  
20 objection? And I only want to know which ones  
21 you believe were not adequately responded to.  
22 And that way, I can take it one by one.

23 I know you all have had a long  
24 history of doing things and there is  
25 disagreement about whether it was enough or not.



1 But for my purposes now, what I can do is say,  
2 if I determine that defendant did not respond  
3 adequately to RFP8, I'll say that and say how it  
4 should be responded to.

5 I don't -- well, let me look at that  
6 first. I'm just wondering if we need to think  
7 about search terms, but let me just look at the  
8 responses first.

9 How soon could you get that to me?  
10 And I say "you." I would like the plaintiffs to  
11 get that to me.

12 MS. BRIGGERMAN: We can get that to  
13 you tomorrow.

14 MS. RICHEY: That would be great.

15 MS. BRIGGERMAN: Absolutely.

16 MS. RICHEY: Okay.

17 MS. BRIGGERMAN: Just one further  
18 point. Mr. Branch was suggesting that the only  
19 claim at issue was this trade secrets  
20 misappropriation claim. That's not the case.  
21 There is a corresponding conspiracy claim.

22 MS. RICHEY: Right. And I've read  
23 that part of the order and understand the  
24 latitude that Judge Webster was going to give  
25 the plaintiffs in connection with the conspiracy

1 claims. Which, I know is not a claim-claim, but  
2 it is one that does provide some enhanced  
3 discovery with respect to trade secret claims.  
4 So I'm aware of that.

5 And I'm also aware of kind of general  
6 rules of discovery and the latitude given to  
7 plaintiffs and the American system. So we're  
8 not going to bend the rules. We're going to go  
9 with them.

10 Okay. So you're going to send me,  
11 Mr. Branch, the order from the UK.

12 MR. BRANCH: That should be in your  
13 inbox.

14 MS. RICHEY: Okay. I don't see it.  
15 Did you send it to the right e-mail address? If  
16 you didn't, just resend it to my new e-mail  
17 address, which is the alice@ACRichey.com  
18 address. You may have sent it to my old one.  
19 That's fine. You can do that later, just so I  
20 get it.

21 And then, Ms. Briggerman, you'll get  
22 me the discovery, and so I can look at that and  
23 determine.

24 Okay. As far as I'm concerned,  
25 that's all we needed to hear about the lot --

1 about motions -- plaintiff's motions one and  
2 two. So the next motion would be -- no, no,  
3 that's not true. We've got the CyberRoot is the  
4 second -- is the plaintiff's submission two.  
5 And that's plaintiff's motion to compel  
6 defendants to produce documents related to  
7 CyberRoot.

8 Is there anything different you want  
9 me to hear on that motion that is different from  
10 the argument you had on general responsiveness?

11 MS. BRIGGERMAN: Well, I think  
12 this -- the CyberRoot motion is similar, but it  
13 come down to potentially a disagreement over  
14 what is relevant as well, so I think that is  
15 important to point out. CyberRoot really is at  
16 the heart of the alleged conspiracy to hack and  
17 steal Mr. Azima's data. And the defendants have  
18 admitted that CyberRoot is relevant. They  
19 admitted so in their initial disclosures, in the  
20 Rule 26F report. And they also admitted that  
21 they made CyberRoot over a million dollars.

22 I think fundamentally what is at  
23 issue is, what was the scope of CyberRoot's  
24 work? What were they hired to do and what did  
25 they do?

1                   We allege that they were hired to  
2                   hack Mr. Azima's data and they did so. I would  
3                   note that Meta, the company that owns Facebook,  
4                   did come out with a report finding that  
5                   CyberRoot was a half-for-hire company. I'm  
6                   happy to provide that report to you, if it would  
7                   be helpful.

8                   Defendants argue that they were hired  
9                   to put together websites, so there is a  
10                  fundamental dispute here as to what they did or  
11                  were hired to do. And yet, defendants have  
12                  produced very little information related to  
13                  CyberRoot. They produced no communications, no  
14                  engagement letters, no reports prepared by  
15                  CyberRoot, no bank records related to CyberRoot.

16                  So again, it comes down to a  
17                  fundamental issue of what are they deeming is  
18                  relevant here?

19                  And, you know, they also admitted in  
20                  their filing after -- when they filed their  
21                  motion for clarification in August with the  
22                  Court when they sought to have the Court  
23                  reconsider that motion, they basically admitted  
24                  that they had documents related to CyberRoot.  
25                  And they were asking the Court to reconsider

1       whether or not they needed to produce them. So  
2       I don't think there is a question that the  
3       documents exist, but they have not been  
4       produced.

5                   MS. RICHEY: Okay. So I have --  
6       recall in Judge Webster's order -- it's ECF248,  
7       which is the lengthy order -- he talks about,  
8       again, some latitude he will give the plaintiffs  
9       to look into that because it may have to do with  
10      the financial trail, I think is the word he --  
11      phrase he used. Again, I'm going to be guided  
12      by that. But what I would like to know is the  
13      specific interrogatories, RFPs, about CyberRoot  
14      and the responses. And then I'll make a  
15      decision about that.

16                   Mr. Branch, anything you want to add  
17      about CyberRoot?

18                   MR. NEUMAN: Ms. Richey, if you'll  
19      allow me, I'll address that briefly. I'll be  
20      brief.

21                   MS. RICHEY: Yes.

22                   MR. NEUMAN: It follows, sort of, the  
23      same themes of what Mr. Branch stated before  
24      about the way discovery has gone. I mean, it --  
25      the CyberRoot motion in particular is based on a

1 series of false assumptions, right?

2 For example, it assumes that  
3 documents related -- certain categories of  
4 documents related to CyberRoot exist in  
5 defendants' data and that we withheld any such  
6 data. Well, we haven't.

7 It assumes that because Mr. Del Rosso  
8 has admitted that it did work with CyberRoot in  
9 the past, that substantial communications exist.  
10 Well, it doesn't.

11 And those are just a few examples.  
12 CyberRoot has been a key allegation in this  
13 matter, right? We know that. We haven't  
14 limited our searches in the database related to  
15 CyberRoot in any way.

16 In fact, we ran multiple searches  
17 regarding CyberRoot in multiple spellings, even.  
18 We broke it up in our analytics to make sure we  
19 were capturing every single document we could  
20 possibly locate within the database. And we  
21 even searched for people that we knew were  
22 associated with CyberRoot by name. And we  
23 didn't find any e-mails. We didn't find any  
24 reports. We didn't find any communications of  
25 any type whatsoever between the parties, between

1 CyberRoot and our client.

2 But what we did find are a series of  
3 invoices and payment records, right, within the  
4 temporal time frame and we produced those by  
5 Bates number.

6 We also found in the database some  
7 letters that our client had received from  
8 opposing counsel that mentioned CyberRoot. We  
9 even produced those to make sure we were  
10 capturing everything that we had having to do  
11 with CyberRoot. So I'm just not sure what else  
12 we can do. We certainly cannot be forced to  
13 produce data we don't have.

14 If we found a report that was  
15 related, we would produce it. If we found  
16 communications, we produced it. It just doesn't  
17 exist. It is not how the parties interact --  
18 how I understand our client and CyberRoot  
19 interacted. So everything else is pretty  
20 similar to what John stated, as to how we run  
21 through our searches, but it just doesn't exist.

22 MS. RICHEY: Has Mr. Del Rosso  
23 testified how he communicated with CyberRoot --

24 MR. NEUMAN: Yes. He test --

25 MS. RICHEY: -- not oral

1       communications, but yeah.

2               MR. NEUMAN: Yes. He testified that  
3       he used a messaging app. I believe -- and I  
4       don't have the transcript in front of me -- but  
5       I believe that he testified that he used an app  
6       called Signal.

7               MS. RICHEY: Okay. And that's the  
8       one that hasn't been searched? Can't be  
9       searched? I read that, but remind me, I can't  
10      recall.

11              MR. NEUMAN: We looked for messages  
12      and there are no Signal messages in existence in  
13      our client's database or copies or images of  
14      any.

15              MS. RICHEY: Would those -- well, all  
16      right, I'm not going to ask you that. That's  
17      not a -- okay. I'll change that one.

18              Let me ask this, though. The laptop  
19      that is in the UK, what is the time frame of the  
20      information on it? Does anybody know? It  
21      hadn't been used in a couple of years, it sounds  
22      like?

23              MR. NEUMAN: I'm not sure we know the  
24      answer -- great question. I'm not sure we know  
25      because we haven't peered into it. But I just



1 don't know at this point, but we'll inquire.

2 MS. RICHEY: Okay. All right. Thank  
3 you.

4 Okay. Anything else on CyberRoot?

5 MS. BRIGGERMAN: I would just  
6 appreciate the clarification. Is Mr. Neuman  
7 saying that there are no communications  
8 whatsoever between defendants in CyberRoot?  
9 Because before you used the term "related to."  
10 And I want to make sure we're not having a  
11 dispute over what is relevant.

12 MR. NEUMAN: No, that's -- I  
13 understand that question, Ms. Briggerman and my  
14 answer to that is, our searches in the database  
15 have not yielded any communications, regardless  
16 of the subject matter.

17 MS. BRIGGERMAN: And same goes with  
18 reports, engagement letters, and the other  
19 documents that I mentioned?

20 MR. NEUMAN: Yes. I know for sure  
21 reports. I know for sure communications. And I  
22 believe that applies to engagement letters, but  
23 I will -- I'll inquire and come back to you on  
24 that to make sure.

25 MS. RICHEY: Mr. Neuman, do you

1     happen to recall when you all responded to those  
2     particular RFPs about the CyberRoot documents,  
3     did you say in there that you did not have  
4     anything to produce or that you -- how did you  
5     state that?

6             MR. NEUMAN: Yeah, there has been a  
7     couple of them. CyberRoot information was  
8     sought, and I believe the first request for  
9     production of documents and, more specifically,  
10    the fourth set of requests for production of  
11    documents -- and I'm referring to our responses  
12    to the fourth set in particular where we made it  
13    abundantly clear in the actual responses that  
14    our client is not in possession of what was  
15    requested, in their possession, custody, and  
16    control when applicable.

17            I need to go back and review what our  
18    responses were to CyberRoot requests in the  
19    earlier request for production of documents.  
20    I'm happy to do that and come back to you on  
21    that.

22            MS. RICHEY: I think sometimes that's  
23    helpful. I know that sometimes the attorneys  
24    will say, We don't have it. Well, what they  
25    mean is, we looked everywhere, it doesn't exist,

1 and it may be interpreted as we didn't look. So  
2 if any clarification on that can help resolve  
3 some of this, let's do that.

4 But when I see those interrogatories  
5 and those responses -- or RFPs and responses as  
6 well, I might have some input on how you all can  
7 supplement it to make that --

8 MR. NEUMAN: Agreed.

9 MS. BRIGGERMAN: I think we're also  
10 trying to get to the bottom of, if nothing  
11 really exists and yet CyberRoot was paid a  
12 million dollars for their work, then there is a  
13 potential issue of spoliation. So we would  
14 request a certification as to how they searched  
15 for documents and confirming that they don't  
16 have anything, if that's really the case.

17 But I would still push back on that,  
18 because you did file a motion in August for  
19 reconsideration of the Court's July 25th order,  
20 which compelled you to search for CyberRoot  
21 documents. And you pushed back -- and I want to  
22 quote from your motion -- you said, "Another  
23 area where Azima is seeking documents unrelated  
24 to Azima is with respect to CyberRoot."

25 So my concern here is that there may

1 be a category of documents that you deem  
2 unrelated to Azima, but we argue are relevant  
3 and should be produced.

4 MS. RICHEY: So again, when I see the  
5 discovery responses, I'll probably have some  
6 input on that.

7 Is it possible -- well, I'm not going  
8 to ask questions, but I'll just make a  
9 statement. If, in fact, there is information  
10 related to communications, reports, data, et  
11 cetera, about CyberRoot on the UK computer, I  
12 don't want -- the defendants will have to make  
13 their statement here relevant to what it is that  
14 they were able to search. Because it might be  
15 that there is some information on that computer  
16 that no one knows about yet.

17 Okay. Anything else, Mr. Neuman or  
18 Ms. Briggerman on that motion?

19 MS. BRIGGERMAN: No, thank you.

20 MR. NEUMAN: No, thank you.

21 MS. RICHEY: All right. Now, let's  
22 move on to the plaintiff's motion to compel  
23 defendants to produce information improperly  
24 withheld for privilege.

25 I had a couple of questions about

1     that, that I would -- maybe have been answered  
2     and I missed, but I couldn't answer for myself.  
3     Which is, again, going back to the discovery.

4             So what specific interrogatories,  
5     document requests, deposition questions have  
6     been asked, and the privilege -- privilege  
7     objection has been interposed. I presume that's  
8     there. I would like to know what those are. I  
9     can't tell what has been -- what exactly hasn't  
10    been responded to on the basis of privilege.

11            I have seen I think just one  
12    privilege log. But I wasn't clear who -- I  
13    think that came from you, Ms. Briggerman. And I  
14    wasn't clear exactly who prepared it. It looked  
15    like maybe Dechert prepared it. And I'm sorry  
16    if I missed another one. But I don't know if  
17    you're at the point where you want me to review  
18    documents. But if you -- I don't know that I  
19    can -- I can't rule on privilege if I don't have  
20    a specific document or piece of testimony to  
21    look at. It is not, you know, enough, as I  
22    think Judge Osteen said, to simply say, it is  
23    privileged because it involves attorney/client  
24    communications. You all know what the privilege  
25    covers and what it doesn't cover.

1                   And so I don't know if we're at the  
2                   point where you want me to do that. But I'll  
3                   just say, without doing that, it may be limited  
4                   what I can do at this moment. So, all right.  
5                   I'll hear from the plaintiff on that.

6                   MS. BRIGGERMAN: Sure. So a key  
7                   issue in this case is how defendants obtained  
8                   Azima's stolen data. There is no dispute the  
9                   defendants have the data. The question is how  
10                  they obtained it.

11                  Their position is that they came into  
12                  the data innocently on the Internet, and used  
13                  NTI, a cybersecurity firm, to retrieve it.

14                  Our position, of course, is that  
15                  Mr. Del Rosso was involved in the hacking of  
16                  Mr. Azima and did so improperly and illegally.

17                  Mr. Del Rosso and others have  
18                  testified in court in the UK and submitted  
19                  numerous witness statements attesting to that  
20                  narrative, that they came into the data  
21                  innocently.

22                  Del Rosso and others have also turned  
23                  over analysis prepared by their vendor, NTI, who  
24                  was acting at their direction to a third party,  
25                  to the FBI, in order to instigate an

1 investigation into Mr. Azima. And yet  
2 Mr. Del Rosso is holding back those reports.

3 Azima is entitled to probe the  
4 veracity of defendants' narrative here as to how  
5 they obtained the data. They can't open the  
6 door by testifying about how they allegedly and  
7 innocently obtained the data, and then withhold  
8 all other information about how the data was  
9 obtained and used because that gives them a  
10 tactical advantage here.

11 RAK's, the purported privilege  
12 folder, has voluntarily waived any potential  
13 privilege by disclosing information they now  
14 seek to cloak in privilege. The general rule is  
15 when a party reveals part of a privileged  
16 communication to gain advantage, as defendants  
17 did in the UK, then the party waives privilege  
18 as to all other communications on that subject  
19 matter.

20 And as I mentioned, Del Rosso has  
21 given nine sworn statements, alongside trial  
22 testimony, divulging information related to the  
23 hacking of Azima, but now del Rosso suggests is  
24 privileged.

25 For example, in a sworn statement

1 submitted on behalf of RAK in UK, Del Rosso  
2 testified about his conversation with a  
3 lawyer -- then, Dechert partner, Neil Gerrard,  
4 and how Del Rosso used NTI to obtain Azima's  
5 data.

6 Dechert has also produced documents  
7 treated at the time as privileged, including  
8 notes containing attorney mental impressions  
9 from a key interview with one of the  
10 coconspirators, Stuart Page, a detailed  
11 chronology analyzing Azima's hacked data, and  
12 internal attorney communications opining on  
13 legal strategies, some of which were actually  
14 marked "privileged and confidential" at the top.

15 In addition, defendants and Dechert  
16 have withheld more than 60 reports prepared by  
17 NTI, purportedly on the basis of privilege. And  
18 that is part of their privilege log, which is  
19 rather lengthy.

20 The defendants have already testified  
21 about the work that NTI did to obtain Azima's  
22 data. They can't use a small portion of that  
23 work to attack Azima's case, and then claim  
24 privilege over the work NTI did related to  
25 Azima's data.



1                   It is our view that these privileged  
2                   communications were revealed in the UK matter to  
3                   be an advantage at trial to support their false  
4                   claim that they didn't hack Azima. And so they  
5                   shouldn't be allowed to selectively pull the  
6                   documents.

7                   I'll pause there. And the other  
8                   issue, I think, that is relevant to the motion,  
9                   is whether or not defendants can assert RAK's  
10                  privilege. It's our position that they can't.  
11                  Only the privilege holder has standing to assert  
12                  privilege. And submitting a vague, conclusory  
13                  letter like they did from RAK's attorney,  
14                  Allen & Overly, is not sufficient. Defendants  
15                  have not cited any case law suggesting that such  
16                  letters are sufficient.

17                  So I'll pause right there if you have  
18                  any questions.

19                  MS. RICHEY: Yeah, so I read that  
20                  letter. And to me, that letter -- well, I read  
21                  the cases and -- only the ones that people  
22                  cited. But there is language in one of the  
23                  cases that was cited by the defendant about  
24                  getting -- being directed by a third party to  
25                  assert the privilege. I have no idea, though,

1       how far that goes.

2                   And I don't know if we need to look  
3       into that further. We can table that for a  
4       minute. But I can't say that I fully understand  
5       what it means for a third party to direct  
6       someone else to assert the privilege. I can see  
7       it in the instance -- well, I can see it in some  
8       instances. I don't know what that means.

9                   However, in the method that -- do you  
10      pronounce it RAK, the acronym? Okay. The  
11      language that they chose to do so is, in my  
12      view, very non-specific. And as you all know,  
13      you can't just say, everything here is  
14      privileged. You have got to be very specific  
15      about what it is, because otherwise, a court or  
16      someone in my position, can't make any sort of  
17      determination about whether it is or is not, and  
18      the plaintiff is in a position to challenge it.

19                  I noted that -- so the Dechert  
20      privilege log, was that in this matter or was  
21      that in the UK?

22                  MS. BRIGGERMAN: Yes, that is in this  
23      matter. Dechert has submitted a privilege log.  
24      And similar to defendants', has a portion, the  
25      majority of it -- the entirety of it where they

1 purport to insert RAK's privilege.

2 MS. RICHEY: Okay.

3 MS. BRIGGERMAN: And defendants the  
4 same way. I believe they also have a portion  
5 where it may be relevant to their own privilege,  
6 which is different. But we're talking here  
7 about the vast majority of the privilege log and  
8 documents withheld that RAK is claiming  
9 privilege over.

10 MS. RICHEY: And so have the  
11 defendants produced a privilege log or documents  
12 over which either it claims privilege or RAK  
13 claims privilege in this matter?

14 MS. BRIGGERMAN: So my understanding  
15 is, that the privilege log they've submitted  
16 is one giant privilege log. I think there are  
17 about three pages. And John and Brandon, please  
18 correct me if I'm wrong. But I think it is  
19 about three pages where they assert their own  
20 privilege. And the remainder of the 90-some  
21 pages are where they say that RAK is asserting  
22 privilege, but there is no indication that RAK  
23 itself has actually asserted the privilege and  
24 gone through and identified privileged  
25 documents.

1 MS. RICHEY: Okay. There was also a  
2 note -- and John, I'll just wait until -- who is  
3 going to speak on this one? Is that you,  
4 Mr. Branch? Okay. Why don't you start. I had  
5 a question about your response, but go ahead and  
6 respond.

7 MR. BRANCH: So to address a couple  
8 of the issues that have come up.

9 First, my client has testified about  
10 how they came into possession of Mr. Azima's  
11 data. He has testified about that. We're not  
12 withholding his privileged information about how  
13 he came into possession of the data. What we're  
14 holding as privilege and what RAK is asserting  
15 as a protective order of the privilege, is the  
16 analysis that was done with the data, what was  
17 done with the data after our client came into  
18 possession of it.

19 Our client was put into a very bad  
20 spot by the allegations that the plaintiff  
21 raised in regards to him arguing that he hacked  
22 Mr. Azima's material. Because on the one hand,  
23 he was a contractor for a law firm rendering  
24 legal advice to a client, so the work that he  
25 did was subject to privilege.

1                   And on the second hand, how does he  
2 defend himself on that?

3                   And so he has provided testimony and  
4 statements about how he acquired the data. But  
5 that has been the extent to it. And we have not  
6 withheld data -- or withheld documents from  
7 production based on a privilege assertion over  
8 communications about how he came into possession  
9 of the data.

10                  Our understanding is that that's been  
11 a consistent possession of RAK throughout the  
12 multiple lawsuits that are ongoing in New York  
13 and the United Kingdom and here, which is that  
14 the -- to the extent where the privilege has  
15 been asserted, it has not been asserted over  
16 documents and communications relevant to the  
17 acquisition of the data. That's reflected in  
18 our document productions here, which is where we  
19 produced, among other things, the documents that  
20 were produced in the United Kingdom case and in  
21 which the privilege assertion was not withheld.

22                  After we had received the plaintiff's  
23 motion on the privilege issue, what we were in  
24 the process of doing is, double-checking the  
25 documents listed in the privilege log and the

1 production that's been made, and comparing it  
2 with the productions that have been made in the  
3 United Kingdom matter to make sure that there  
4 has been a full production and to double-check  
5 and make sure that we have not withheld anything  
6 about the acquisition of the data.

7 But that's -- our position is not --  
8 Nick can testify about how he acquired the data  
9 and doesn't have to produce things. That is a  
10 mischaracterization of the defendants' position  
11 in this case. Our position is he testified  
12 about how he acquired the data and we're not --  
13 and RAK is not asserting the privilege on that  
14 issue.

15 Where it is asserting the privilege  
16 is with regards to what was done with the data  
17 after it was acquired because that -- those acts  
18 were done in furtherance of legal advice that  
19 was provided by Dechert to RAK.

20 To your second point, about the  
21 letter being very non-specific in assertion, I  
22 hear you. But the letter is not the only aspect  
23 that has occurred in the privilege process here.  
24 What has occurred is, we have served a privilege  
25 log -- I think it was 99 pages long. Three

1 pages of which are documents that our clients  
2 asserted their attorney-client privilege over.  
3 The balance of the privilege log has privilege  
4 designations by RAK. Those privilege  
5 designations were identified, reviewed and  
6 approved by counsel for RAK.

7 And so to the extent that there are  
8 concerns about, oh, well, specific instructions  
9 on asserting the privilege and whatnot, well,  
10 they selected the documents that they are  
11 asserting the privilege over. And logically,  
12 that's what has to happen.

13 RAK is the end client on this. They  
14 received the legal advice. They are the ones  
15 that can identify the documents and information  
16 that were utilized in receiving the legal advice  
17 from their lawyers.

18 We went through that process with  
19 RAK, we identified those documents and we logged  
20 them. And those have been provided. So there  
21 is specificity here.

22 I understand that there will likely  
23 be disagreement about specific documents within  
24 the log, but this -- an overarching -- we hoped  
25 that we've addressed an overarching concern

1 about a non-specific letter by providing a  
2 detailed privilege log that has been signed off  
3 on by the end client.

4 MS. RICHEY: That privilege log, the  
5 99 pages, is it the position of the defendants  
6 that all of those documents are responsive, but  
7 not being produced because of the privilege or  
8 is this just a general privilege log that RAK  
9 has prepared for other matters?

10 MR. BRANCH: No. This is -- this is  
11 a privilege log prepared specifically for this  
12 case in response to plaintiff's request for  
13 production of documents and documents that we  
14 identified that were responsive to those  
15 requests.

16 MS. RICHEY: Okay. I just want to be  
17 sure, because you had mentioned the fact that,  
18 with respect to documents, as to how your  
19 clients came into possession of the data, you  
20 were distinguishing those from documents that  
21 dealt with what happened to the data after they  
22 came into possession of it.

23 So I just want to make sure that your  
24 position on the privilege log is that whether it  
25 is about that -- the first issue of how it came



1     into possession or the second issue of what they  
2     did with it, that the documents on that log are  
3     responsive to certain discovery requests of the  
4     plaintiff, but being withheld on the grounds of  
5     privilege, not relevance.

6             MR. BRANCH: Yes, ma'am, that's  
7     correct. It is a privilege log, not a list of  
8     documents that are -- that our position is they  
9     are not relevant.

10            MS. RICHEY: And is it the position  
11    of the plaintiff that all of those documents  
12    should be produced based on what you see on the  
13    privilege log?

14            MS. BRIGGERMAN: Yes, that's  
15    correct -- well, within the category of  
16    documents we're discussing here. The scope of  
17    which is anything related to how Mr. Del Ross  
18    obtained the data and how he used it.

19            MS. RICHEY: Okay. All right.

20            MR. BRANCH: And, Ms. Richey, I think  
21    the end of that sentence is going to end up  
22    being the key here. Because our -- the  
23    defendants' position -- and you can look at his  
24    testimony -- is Mr. Del Rosso didn't testify  
25    about how the documents were used. Because that

1 was part of the legal representation of RAK by  
2 Dechert, and for which our client was, in part,  
3 engaged. That has never been a part of the  
4 testimony that he's offered up. And RAK has  
5 been consistent in asserting its privilege over  
6 those documents.

7 Which is why we get to this argument  
8 that the plaintiff is making, that RAK can't  
9 assert its privilege through the defendants in  
10 this case or RAK has to intervene.

11 Your Honor has read the cases. The  
12 cases don't support that. I have not found case  
13 law that requires a third-party privilege holder  
14 who is not a party to a lawsuit to intervene to  
15 protect the privilege.

16 And that's -- it is inconsistent with  
17 the sanctity with which the attorney-client  
18 privilege is held under the common law. You  
19 have to take an action to protect the privilege.

20 For example, the Gibbs case makes it  
21 plain that a lawyer can't assert a privilege  
22 without the client's authority, for example.  
23 But at the same point, there is not case law  
24 that raises extensive hoops that privilege  
25 holders have to jump through in order to

1 maintain the privilege.

2 I mean, if -- let's say a law firm  
3 got a civil subpoena for a production of their  
4 electronic database for some reason. Would  
5 every client in the law firm then have to  
6 intervene in the case in order to protect the  
7 privilege? I have not found any case law that  
8 would require that sort of effort by the  
9 privilege holder.

10 And so we understand that it poses  
11 some challenges in going through the review  
12 process on privileged documents, and we're doing  
13 everything we can to provide that data. And I  
14 hope the description of what we've done to come  
15 up with the privilege log provides you with some  
16 assurances that we are working in good faith to  
17 get that.

18 But the case law, we've not found  
19 case law support for a requirement for a party  
20 to intervene in order to protect the  
21 attorney-client privilege.

22 MS. RICHEY: So on that point, I read  
23 the cases that you cited, which said what they  
24 said, but didn't go into process at all. I  
25 mean, they didn't say, well, therefore, there

1 has to -- there doesn't have to be an  
2 intervention, et cetera. I don't know the  
3 answer to that.

4 I would like -- I'd like to have a  
5 little more case law on that if there is  
6 anything. I would like to know the plaintiff's  
7 position on that. I don't see -- your cases say  
8 what they say. But again, it didn't tell me --  
9 and maybe there is nothing out there and I'll  
10 just have to decide -- but it didn't tell me  
11 that that meant categorically if someone simply  
12 says to another party asserted, that then that  
13 party doesn't have to intervene. It may be the  
14 case. I just don't know. I haven't dealt with  
15 that before.

16 Is it the plaintiff's position that  
17 they would like these documents to be reviewed  
18 to determine if the privilege applies?

19 MS. BRIGGERMAN: So what we would  
20 prefer and ask the special master to do is,  
21 issue a ruling that, within this scope of any  
22 documents or communications related to how  
23 Mr. Del Rosso obtained or used the data, are not  
24 privileged, whether it's privilege has been  
25 waived or privilege just simply doesn't apply,

1 and that they must be turned over.

2 MS. RICHEY: Yeah. Okay. Go ahead.

3 MS. BRIGGERMAN: If -- another -- an  
4 alternative would be that we could go through  
5 the defendants' privilege log and identify --  
6 you know, it is a long privilege log -- at least  
7 categories, certain documents we argue no  
8 privilege applies, whether through waiver or  
9 simply for which didn't exist, and then you  
10 could make a ruling that way.

11 MS. RICHEY: Without looking at the  
12 documents?

13 MS. BRIGGERMAN: Well, no. I assumed  
14 that you would probably have to look at the  
15 documents as well.

16 MS. RICHEY: Yeah.

17 MS. BRIGGERMAN: But, I mean, our  
18 position is that Mr. Del Rosso has already  
19 testified on these topics, and so there is a  
20 subject matter waiver. And that's -- I'm not  
21 sure you need to look at documents to reach that  
22 conclusion.

23 MS. RICHEY: So, yeah. Two  
24 questions. One would be waiver. And I have  
25 seen the arguments and I have seen a little of

1 the testimony. I'll say I don't feel competent,  
2 based on what I have seen so far, to say waive  
3 or no waiver. I don't -- I didn't get a full  
4 rundown of what happened in the UK.

5 But yes, if they have been waived,  
6 they have been waived. But you know as well as  
7 I, that is very fact specific and what exactly  
8 has been waived and how and whatnot.

9 I don't know that I'm in a position  
10 to make an order or to make any decisions that  
11 says categorically, that there is no  
12 attorney-client privilege in connection with  
13 those documents. It's been asserted with a pen  
14 in the issue of whether it's been properly  
15 asserted given that RAK has not intervened.

16 But assuming that it has been  
17 properly asserted, then I think the burden  
18 shifts. And I think the plaintiff needs to say,  
19 With respect to these documents -- whether it is  
20 five or whether it is 99, we don't believe that  
21 these are privileged. We would like an  
22 in camera review, and maybe put this at the  
23 beginning -- we think it has been waived as to  
24 these documents, and tell me why.

25 I don't want to put more work on you

1 all, but I think it would be negligent of me to  
2 simply say, privilege waived, or there is no  
3 privilege without getting more information. I  
4 don't think that stops the other things you're  
5 doing, unless you believe that some of those  
6 things need to be resolved before another  
7 deposition of Mr. Del Rosso -- that we'll get to  
8 in a minute -- or a 30(b)(6) or any other  
9 depositions in play. But I need more  
10 information.

11 MS. BRIGGERMAN: I do want to  
12 foreshadow that we do have a motion to you  
13 coming related specifically to the reports that  
14 NTI prepared at Del Rosso's direction because  
15 those were turned over to the FBI as part of the  
16 meetings that Mr. Del Rosso had with the FBI, as  
17 plaintiff alleges, to instigate an investigation  
18 into him.

19 So it is a somewhat separate issue.  
20 You could argue waiver, as we have here. But  
21 also, waiver in the context that Mr. Del Rosso  
22 has testified about this topic. But also, that  
23 the documents have been turned over to a third  
24 party and, therefore, are non-privileged. So --  
25 and that is forthcoming.

1 MS. RICHEY: Okay. Were those turned  
2 over voluntarily or subject to --

3 MS. BRIGGERMAN: Yes.

4 MS. RICHEY: Okay. Mr. Branch --

5 MR. BRANCH: So, Ms. Richey, if I may  
6 respond to it.

7 MS. RICHEY: -- do you want to  
8 respond?

9 MR. BRANCH: A few things there.  
10 First of all, with regard to these reports that  
11 were turned over to the FBI, this is something  
12 that Rich Garcia testified to last week in a  
13 deposition that we were not -- I can say we were  
14 not aware of until the deposition. So we're  
15 doing due diligence on that item right now. So  
16 I understand plaintiff's position on it.

17 I also note, however, that the  
18 documents would be subject to work product  
19 protection, irrespective of the attorney-client  
20 privilege. These are reports that NTI generated  
21 analyzing the Azima data that they downloaded  
22 from BitTorrent and provided to Dechert in  
23 connection with Dechert's representation of RAK.  
24 And so it comes under this idea of plaintiff's  
25 trying to pierce the attorney-client privilege



1 on how the data was used as opposed to how it  
2 was acquired. So just to flag for you, that is  
3 a bit of a new issue for us, at least.

4 The second piece of information I  
5 wanted to offer to you is, you said you hadn't  
6 seen a number of the statements.

7 Mr. Del Rosso's witness statements in the UK  
8 litigation are located at docket entry 132-1,  
9 Exhibits A and B. There is an additional  
10 witness statement as Exhibit C as well. So it  
11 is A, B and C on docket entry 132-1.

12 There is also a declaration filed at  
13 docket entry 157-8. And then there is the  
14 transcripts of Mr. Del Rosso's depositions in  
15 this case as well.

16 And then there is a declaration that  
17 he filed in a 1782 application that is pending  
18 in the middle district. It's at 21MC-6 also.

19 So those are where his testimony is  
20 located. And Brandon, Lauren, if I've missed  
21 one, you all feel free to jump in. This was  
22 kind of a back of the envelope list that I was  
23 putting together. And I'm certain that we can  
24 provide you with his deposition transcript as  
25 you may want.

1           The one thing I will point out also  
2     is, I understand your -- the concern you have in  
3     deciding the privilege issues without looking at  
4     the documents. I will note again that my client  
5     is caught between a rock and a hard place on  
6     this one. He needs to defend himself against  
7     these allegations that are untrue that he hacked  
8     Mr. Azima.

9           At the same point, he professionally  
10    was a contractor for a law firm who was  
11    providing legal advice and has the end client  
12    asserting privilege. And we're about to -- you  
13    know, what is being discussed is what appears to  
14    be a very lengthy privilege review process that  
15    will be expensive for everybody.

16           And I will, you know, cite back to  
17    the proportionality construct in Rule 26 that,  
18    you know, as we work through how to do some of  
19    this, I do think we need to be keeping  
20    proportionality in mind. My client has been  
21    through a lot, your Honor. Notwithstanding some  
22    of the statements plaintiffs have made, he has  
23    produced documents. He has engaged in good  
24    faith in the discovery process. And at some  
25    point, there needs to be an end to it.

1                   So we're here, we're going to do what  
2                   we have to. But it doesn't seem to be an end  
3                   point to the process, is one of our main  
4                   concerns here. So --

5                   MS. RICHEY: Okay.

6                   MS. BRIGGERMAN: Ms. Richey, may I  
7                   address the case law issue that you just  
8                   mentioned with respect to whether RAK has to  
9                   formally intervene in this matter?

10                  And I agree the case law is not  
11                  crystal clear, although in Gibbs, the Court did  
12                  order the third party to intervene. And the  
13                  Court found it was insufficient that the third  
14                  party had a letter that was very similar to the  
15                  Allen & Overy letter we see here. And it said  
16                  something like -- in the letter, that the  
17                  company is not waiving attorney-client privilege  
18                  and instructed the defendants in that case not  
19                  to do something different than what the company  
20                  wants to do with respect to its privilege. So  
21                  it was sort of these conclusory statements that  
22                  were not sufficient.

23                  And, you know, here it is a similar  
24                  situation. RAK is sort of hiding in the  
25                  background here, and in his vague, conclusory

1 way is asserting privilege over all of the  
2 documents that are on this 90-page privilege  
3 log. And yet, we don't have a way to hold him  
4 accountable or, you know -- or to hold them  
5 subject to, frankly, your rulings, if they are  
6 not a party here.

7 MS. RICHEY: Well, if the documents  
8 are in the possession of Mr. Del Rosso and he is  
9 ordered to turn them over, then that's the  
10 relief. But I don't, right now, feel adequately  
11 prepared to make that decision.

12 I did read the Gibbs case and I saw  
13 what you saw, but I don't think those facts were  
14 similar. And I don't think it was as clear.  
15 And certainly the parties weren't arguing that  
16 they had been requested and directed by the  
17 privilege holder to assert it. So I'm not sure  
18 if the Court just didn't address that, but I  
19 didn't see that in this case.

20 Okay. All right. I think -- I'm  
21 not -- again, I'm not making -- on this hearing,  
22 I'm not making any decisions. I'm just going to  
23 forecast what I'm thinking about, and then I'll  
24 put it in writing.

25 But I think on this issue, I'm going

1 to need to get from you any additional case law  
2 that is out there -- and again, there might not  
3 be; we just might have to deal with what we  
4 have -- that would seem to require RAK to  
5 intervene, or on the defendants' side to say no,  
6 they definitely don't have to intervene. And  
7 this is some cases where that wasn't done.

8 I would like the plaintiff to go  
9 through that privilege log and identify  
10 documents that it believes are both responsive  
11 and believe are not privileged, again, based on  
12 the description. I'm going to hope that's not  
13 99 pages or 90 pages worth, however many it is.  
14 If it is, we'll have to think about that and  
15 think about proportionality in those issues.

16 I'm not at this moment overly  
17 concerned about proportionality in reviewing  
18 documents. I've already spent a lot of time  
19 reviewing documents that you have provided me,  
20 and somebody might have to do that. So I'm not  
21 yet overly concerned about that. You might  
22 change my mind when I see what's out there, but  
23 let's table that for the moment.

24 MR. BRANCH: Yes, ma'am.

25 MS. RICHEY: And you mentioned that

1       there are some documents -- and I read this in  
2       your papers -- that Dechert had asserted a crime  
3       fraud exception, or whatever they call it in the  
4       UK, something else, that there were certain  
5       documents they had said there was a crime fraud  
6       exception had produced them. But none of those  
7       covered their communications with your client.

8                     Did I understand that correctly?

9                     MR. BRANCH: Yes, ma'am. There is  
10       iniquity exception to the --

11                    MS. RICHEY: Right. Is that like the  
12       crime fraud exception?

13                    MR. BRANCH: Sort of. And I don't --  
14       I can't tell you I understand it well enough to  
15       really speak to it. But what I can tell you is,  
16       it concerned somebody by the name of Stuart  
17       Page, and representations that Mr. Page made.  
18       It did not concern VMS or Mr. Del Rosso. So  
19       it's just -- the inequity rule doesn't apply to  
20       our client as --

21                    MS. RICHEY: Well, of course, yeah.  
22       I think the plaintiffs would take exception to  
23       that. But yes, I understand.

24                    And I understand too from your papers  
25       that Dechert has produced some more documents,

1 and you all need to review those and see if any  
2 of those are responsive. Did I get that  
3 correctly?

4 It was a footnote, where you said  
5 that Dechert has produced additional documents  
6 based on the application of the inequity  
7 exception and that you were verifying whether  
8 any documents will be produced here.

9 MR. BRANCH: Yeah, we're double --  
10 basically, crosschecking with the Dechert  
11 production to make sure that our production is  
12 complete. I think it is, but this is -- you  
13 know, we're largely doing a quality control  
14 review on a couple of issues that have been  
15 raised in the motion that plaintiff submitted  
16 last week that were -- you know, there might --  
17 I'll put it this way: There might be a  
18 supplementation of a few documents. I am  
19 unaware of any concern that there is, like, a  
20 tranche of anything out there that would need to  
21 be disclosed.

22 MS. RICHEY: Okay. I guess this  
23 was -- I thought I read this in your privilege  
24 response, so I didn't know if any of those  
25 documents might result in a change to your

1 privilege log. But you'll look at those and  
2 compare --

3 MR. BRANCH: I don't think so. I  
4 think we'll -- we will double-check and make  
5 sure. This is where -- and I believe what that  
6 is talking about is, Dechert, in the UK matter,  
7 disclosed documents. And, you know, our  
8 position here is, if we're asserting privilege  
9 but it has been disclosed in the UK matter, it  
10 is no longer confidential. We can't assert  
11 privilege. And therefore we have to produce  
12 them.

13 And so we're -- I think there is a  
14 pretty small universe of documents that there is  
15 a supplemental production of in the UK matter,  
16 and we're trying to make sure that they are  
17 responsive in this matter. And if so, if they  
18 are, they will be produced.

19 MS. RICHEY: And to that end, you  
20 will also cross-reference that with your  
21 privilege log so that if anything needs to come  
22 off that log, you'll let the plaintiff know?

23 MR. BRANCH: Absolutely.

24 MS. RICHEY: Okay. Okay. All right.  
25 Let's skip over the deposition motion. We'll



1 get back to that. But I would like to turn to  
2 the defendant's motion to compel the plaintiff  
3 to identify trade secrets, if that's all right.  
4 We'll do that next.

5 MR. ROSENTHAL: It's very much all  
6 right. This is Sam Rosenthal from Nelson  
7 Mullins. And to Ms. Richey, I heard -- your --  
8 the format that it seems like you prefer is what  
9 is the request, what are the response to it, and  
10 why was that response deficient? And that's  
11 exactly what I want to do.

12 I would like to do a PowerPoint --  
13 and let me share it now -- which does exactly  
14 that. And it touches on the law, but I don't  
15 think you need much discussion about what the  
16 law is. I just have to figure out how to share  
17 my screen. I take it, it is not sharing at this  
18 point. Let's see. Share screen. There we go.

19 Is that now showing up?

20 MS. RICHEY: No, it's not. I'm just  
21 checking that you're allowed to do it.

22 MR. ROSENTHAL: That would be a  
23 problem. That would be a problem. Let's see.  
24 Share screen.

25 MS. RICHEY: Since Mr. Branch was

1     able to share his, could you maybe send it to  
2     him and he could share? If that's -- well, keep  
3     trying. Keep trying. We're fine.

4             MR. ROSENTHAL: I know what the  
5     problem is. I have to put it on my screen. And  
6     now I have to --

7             MS. RICHEY: Yeah.

8             MR. ROSENTHAL: Yeah. Why isn't it  
9     sharing?

10            MR. BRANCH: I can -- Sam, if you  
11     want to e-mail it to me, I can call it up and  
12     you can just tell me "slide."

13            MR. ROSENTHAL: Sure. Okay. If I  
14     can do that. I'm showing my age, I know.

15            Let's see. I think you have it from  
16     earlier. Give me one second.

17            MS. RICHEY: Take your time.

18            MR. ROSENTHAL: Okay. All right.

19     Mr. Branch, you have the controls.

20            All right. Did it come through?

21            MR. BRANCH: One moment. I've got  
22     the version from earlier today, so I can do it.

23            MR. ROSENTHAL: Okay. Actually, if  
24     you have the one that says "Tuesday" on it.

25            So as I said, the idea is to talk

1 specifically about what was the request, what  
2 was the response and why is it deficient.

3 Is it showing up, John?

4 MR. BRANCH: Yes, one moment. There  
5 we go.

6 MS. RICHEY: I can see that.

7 Can everyone else?

8 MR. ROSENTHAL: Yeah. So go to the  
9 next slide.

10 John, do you want to go to the next  
11 slide?

12 Okay. So the law is clear. I don't  
13 really want to dwell on it, because I think,  
14 Ms. Richey, you probably know it better than I  
15 do. But there has got to be two things at  
16 least. One, there has got to be a trade secret.  
17 Two, it's got to have some value if it is  
18 disclosed. And three, there have to be steps  
19 that is -- that are taken by the plaintiff in  
20 order to keep it as a trade secret.

21 Let's go to the next slide.

22 And so what are the requests that we  
23 ask for? And I wrote down here it's 1-13 and  
24 it's 14. But in truth, there are many others  
25 that go to those issues. These are the ones

1       that most directly in the request for production  
2       go to exactly the statutory issues. What was  
3       the secret? How was it maintained in a secret  
4       way? And what was the value that it would have  
5       had if disclosed?

6                     Do you want to go to the next slide,  
7       John?

8                     Interrogating, the same thing. As  
9       you can see, it is three, six and seven exactly  
10      follow the statute.

11                    What is your trade secret? How did  
12      it have any value? And what did you do to  
13      maintain it in the secret fashion? Those are  
14      the specific interrogatory numbers that we have  
15      there.

16                    Do you want to go to the next slide?

17                    In looking at the case law, and  
18      specifically the *Niederland* case that we cited  
19      in the brief, it is in red. It says  
20      "Identifying categories of information, and  
21      thousands of pages of documents without more  
22      explanation does not seem to be sufficient."

23                    That is the law, and there is just  
24      no, really, any dispute about it. You can't  
25      identify thousands of pages and say, You go

1 hunt, you go find it, and we'll tell you if it's  
2 a trade secret; and if so, what we did to  
3 protect it and how we lost value.

4 So let's see what they did. Next  
5 slide.

6 So what they did was, they said there  
7 were over one million documents that, quote,  
8 "contain trade secrets." They then said that,  
9 as an example, we'll give you a 56,741  
10 Bates-number range. You go find them.

11 And we're going to look at what that  
12 range actually entails. And what we see are  
13 vulgar jokes, making fun of people for their  
14 sexual identity, things that are taken from  
15 websites. Let's go to some of the examples and  
16 see what is contained within the range.

17 Here is one, for example -- and  
18 actually, my screen is kind of tiny. Let me  
19 just blow it up there.

20 It is one in which they are, I guess,  
21 talking about an individual and his sexual  
22 preference and applying something they call the  
23 "man test." It is vulgar. It has nothing  
24 secretive. It has no value. No one is going to  
25 pay a dime for this thing. And for them to

1 identify a document, 95626, specifically, as one  
2 of the documents in the Bates range that they  
3 say is a trade secret is really, you know, quite  
4 in bad faith.

5 As is the next one. Let's go to the  
6 next one.

7 This is an e-mail from a friend of  
8 Mr. Azima named Jay Solomon, a journalist. And  
9 what he is sending is something talking about  
10 spending 36 hours in Nice, France. Has no  
11 personal observations. It is something that I  
12 presume Mr. Solomon found talking about what a  
13 wonderful trip it is to Nice, France.

14 No value. It is not a trade secret.  
15 It has no business being marked confidential,  
16 pursuant to court order. Let's go to the next  
17 one that they identify as part of that -- as  
18 trade secrets.

19 Here is one that talks about is  
20 Hillary Clinton a crook, crooked Hillary  
21 Clinton. Truthfully, I don't think anyone cares  
22 about Mr. Azima's political affiliations. This  
23 has no business being a trade secret. They  
24 nevertheless identify it as one.

25 Next slide.

1                   This is one that -- another one of  
2                   those vulgar ones that we find in Mr. Azima's  
3                   designated trade secrets, marked "confidential"  
4                   pursuant to court order. It is a vulgar joke.  
5                   The kind of ironic thing about this, it is the  
6                   only one that looks like it is a formula. It's  
7                   a formula about nothing that really belongs in  
8                   litigation over trade secrets. I doubt very  
9                   seriously that Mr. Azima would contend to trial  
10                  that this is a trade secret, even though he  
11                  identified it as such in his discovery to us.

12                  Let's go to the next slide.

13                  So after they gave us this range of a  
14                  million documents and then the hundreds of  
15                  thousands of pages as an example, we said that's  
16                  not enough. We're going to move to compel. So  
17                  they said, okay, we have a new designation. It  
18                  is 587 documents. A narrow, 587 documents that,  
19                  quote, "purportedly contained trade secrets."  
20                  but this wasn't even a complete list. It was  
21                  simply examples. So let's see what their  
22                  examples are.

23                  Next slide.

24                  What we see are photographs that they  
25                  have literally copied from Internet sites that

1 they don't own, they don't control and that are  
2 publicly available.

3 Let's give an example on the next  
4 slide. The picture is the one that they have  
5 and it was marked "confidential" pursuant to  
6 court order. I put the nice brown framing  
7 around it. But this is their document that they  
8 call a trade secret. I don't know why they  
9 think this particular piece of equipment has any  
10 function that they can claim is their trade  
11 secret, but the most amazing thing about this  
12 piece of equipment --

13 Let's go to the next slide.

14 -- is it is not even theirs. It  
15 comes from a website. What they did -- and  
16 let's go back to the other picture -- is the  
17 identical picture. It is not a similar picture.  
18 It is the identical picture that they simply  
19 copied, marked it "confidential pursuant to  
20 court order," and treated as one of their 577  
21 trade secrets. Well, maybe this was a mistake.

22 So was the next one. Which are  
23 containers that Mr. Azima has marked  
24 confidential pursuant to court order. These are  
25 supposedly his trade secrets. Where did he get



1     it from? Same website. Same picture. Not  
2     similar, same. Identical.

3             Let's go to the next one.

4             Ah, two Mercedes trucks.

5     Confidential pursuant to court order? No.

6             Let's go to the next website. Next  
7     one, John. I don't know if you're on the  
8     website, John, with a -- John?

9             MR. BRANCH: Sorry. Were you looking  
10    for the crane trucks or the Mercedes trucks?

11            MR. ROSENTHAL: Mercedes trucks.

12            MR. BRANCH: Okay. So --

13            MR. ROSENTHAL: I wanted to show --

14            MR. BRANCH: -- this is the one that  
15    was marked. This is the website.

16            MR. ROSENTHAL: 694689. Again,  
17    another one that comes directly from a  
18    third-party website. It is a copy of a picture  
19    that they simply took off the Internet. They  
20    marked it "confidential pursuant to court  
21    order."

22            Let's go to the website one. And  
23    then let's go to slide of the blue and white  
24    truck with the crane.

25            Another example.

1                   Let's go to the next slide, where you  
2                   can see it comes from the Internet.

3                   And these are just examples, because  
4                   that's what they said they gave us. Examples of  
5                   what their trade secrets are. And I could go  
6                   through dozens of them, which are simply -- I  
7                   can't call it anything other than lies. They  
8                   are not trade secrets. They are not secrets.  
9                   They are simply copies of pictures that are  
10                  found on the Internet that Mr. Azima didn't  
11                  take. He didn't authorize anyone to take the  
12                  photograph. He didn't operate the equipment.  
13                  It is simply something that is publicly  
14                  available and there's nothing even close to a  
15                  trade secret.

16                 And so I can go through the other  
17                 ones. But then --

18                 And you can kind of flip through  
19                 them, John.

20                 More containers. And then you get to  
21                 an interesting one.

22                 If you can flip through to the dirt  
23                 and the mountains in the background. I don't  
24                 know if you're on that one, John.

25                 MR. BRANCH: I am. I am on the

1 mountains in the background.

2 MR. ROSENTHAL: Okay. So you look at  
3 that one and you say, Well, gee what is this?  
4 What is he contending? Is the dirt a trade  
5 secret? Is it the fence along the left-hand  
6 side? Is it the mountains? It is nothing.  
7 There is no equipment. It is just a picture of  
8 mountains and dirt, and he is contending it's a  
9 trade secret. We'll get to in a minute where  
10 that comes from.

11 But then you get to 100 blank pages  
12 marked "confidential pursuant to court order."  
13 Not -- you know, occasionally, one slips in.  
14 But when they say they produced over 500, 100 of  
15 them, bear in mind, are simply blank. Nothing  
16 on it, but "confidential pursuant to court  
17 order."

18 Let's go to the next slide, which is  
19 the third tactic.

20 So in response to our motion, they  
21 did something interesting. Even though they  
22 have never withdrawn their one million pages,  
23 they have never withdrawn their 577 examples,  
24 now they say, Well, we'll give you 47 new ones.  
25 These are 47 that are not included in the 577.

1 These are just entirely a new set of documents.

2 So what do they include in the new  
3 set of documents?

4 Let's go to the next one, which is a  
5 proposal by a third party, not Mr. Azima. Yeah.  
6 It shows that Farhad Azima is copied. And what  
7 is it? It is simply a proposal by a third party  
8 in which Mr. Azima is copied, talking about the  
9 number of refers that they could provide. It  
10 has a pricing proposal. And the interesting  
11 thing about this is not only is it not  
12 Mr. Azima's document, but it is dated in 2012.  
13 In other words, nine years before it was  
14 supposedly published -- or six or seven years  
15 before it was supposedly published on the  
16 Internet.

17 Does anyone really care what Farhdi  
18 proposed six years earlier? I doubt it. But  
19 the most significant thing is, it is not even  
20 Mr. Azima's trade secret, if it is anyone's at  
21 all.

22 Let's go to the next document.

23 This is the proposal itself. And  
24 once again, this is not Mr. Azima's proposal.  
25 He has not told us what, within this document,

1 he contends is confidential or what he contends  
2 is a trade secret, which is akin to a formula.

3 But the interesting thing, if you  
4 look on the right-hand column, there is our dirt  
5 and our mountains. What Mr. Azima did was, he  
6 went to a proposal submitted by a third party.  
7 He copied a picture from that proposal. He  
8 stuck it in his production. And he marked it  
9 "confidential pursuant to court order." That's  
10 my trade secret. I don't think so.

11 Let's go to the next document.  
12 Included in his new 47 is an invoice from Habaab  
13 company.

14 Are you on that document, John?

15 MR. BRANCH: Yes.

16 MR. ROSENTHAL: So this is a document  
17 that Mr. Azima, who has no ownership interest in  
18 Habaab, has not asserted any of the statutory  
19 criteria why an invoice from Habaab or a  
20 proposal from Habaab should be regarded as a  
21 trade secret.

22 Again, the statute is pretty clear.  
23 He has to show what value this would have if  
24 disclosed. We asked them that in our document  
25 request. We asked them that in their

1       interrogatories. What does he do? He gives us  
2       this document without any explanation as to why  
3       it is a trade secret.

4               Let's go to the next one.

5               This is an interesting one. It is a  
6       proposal by a company called Heavy Lift. Heavy  
7       Lift is no longer in business. This is dated  
8       June of 2008. Heavy Lift was defunct long  
9       before this document was supposedly published on  
10      the Internet in 2017, 2018 or 2019.

11              Again, there is no indication in  
12      answering our interrogatory why a document from  
13      a defunct company, which is over a decade old,  
14      had any value whatsoever to anybody. No answer  
15      in terms of the interrogatories.

16              Let's go to the next one just to  
17      show, again, more information from 2008.

18              Again, it is a defunct company:

19              Let's go to the next slide.

20              So just to make the point, they gave  
21      us examples. They have never withdrawn their  
22      one million pages, their 577 documents. We are  
23      left guessing which of their trade secrets, to  
24      use their word, are we going to have to defend  
25      against.

1                   If it is limited to what they have  
2                   produced, that is their 47, let them say so.  
3                   Let them say what economic value it has and how  
4                   Mr. Azima treated them as secret. And we'll  
5                   file a motion for summary judgment, the case  
6                   will be over and that will be the end of it.  
7                   But we shouldn't have to guess.

8                   And just to go to the last one, which  
9                   is the relief. The most important thing is, we  
10                  have to designate an expert. And even now, we  
11                  are left guessing at which of their -- I can't  
12                  think of another word -- their cockamamie  
13                  documents, which they copied from someone else's  
14                  website we are going to have to confront. We  
15                  can't have an expert guessing which of the 577  
16                  documents or the hundreds of thousands that they  
17                  earlier had designated as trade secrets he has  
18                  to testify to.

19                  So what we are requesting is that  
20                  they should be limited to their documents that  
21                  they have already identified. That is, the 47  
22                  or they can use the 577 ones. They can't add to  
23                  it. And they have to provide the information in  
24                  response to our interrogatories and our document  
25                  requests that fill out the statutory criteria.

1 Namely, how did you maintain it as secret? And  
2 what evidence do you have, what documents, what  
3 information that it had any value? And we  
4 should do that before we have to designate an  
5 expert. And I think that deadline is coming up.

6 And that's all I have.

7 MS. BRIGGERMAN: Ms. Richey, may I  
8 respond?

9 MS. RICHEY: Absolutely, yes.

10 MS. BRIGGERMAN: I do appreciate that  
11 Mr. Rosenthal took the time to go through dozens  
12 of gigabytes of our client's stolen data, which  
13 are in the possession of his client. And that  
14 shows how complicated this case is. It is not  
15 the typical case.

16 This is not a case where a competitor  
17 has stolen the recipe for Coke to try to start  
18 another company. Decades and decades of work of  
19 our client's data was stolen. And so it is very  
20 difficult to identify trade secrets with  
21 specificity. But we have done that.

22 We first identified the hacked data  
23 back in April. And within that hacked data, we  
24 provided specific examples of trade secrets.  
25 Now, some of those trade secrets, for completion



1 purposes, we included the entirety of an e-mail  
2 chain for example. If it was attached to a  
3 cover e-mail, we included that as well for  
4 completion purposes. And I believe the RFPs did  
5 request communications as well. And so it was  
6 broader than just specific trade secrets.

7 But then in December, to assist the  
8 defendants, we did produce a call down set of  
9 specific examples of trade secrets. And that is  
10 the -- Sam says 48 -- I don't have the exact  
11 number in front of me, but it is certainly a  
12 call down set of trade secrets that are  
13 Mr. Azima's.

14 And like I said, it is impossible to  
15 specify all of the trade secrets with certainty  
16 because all of his data was stolen. But those  
17 are concrete examples and we think we fulfilled  
18 our obligations there. There is nothing under  
19 the case law at this stage -- we're not at the  
20 summary judgment stage -- that requires  
21 Mr. Azima to identify the specific value of a  
22 trade secret. All the case law says is that we  
23 are required to do more than simply identify  
24 categories of documents and what those types of  
25 documents are.

1                   And we think we have done so. We  
2                   have explained what the trade secrets relate to.  
3                   We've identified them with specificity. And of  
4                   course they are all Mr. Azima's. So we think we  
5                   complied with our obligations.

6                   MR. ROSENTHAL: Let me respond to  
7                   that. It's pretty much impossible to identify  
8                   with certainty the trade secrets. They did.  
9                   They identified silly documents that were copied  
10                  from the Internet and marked it "confidential  
11                  pursuant to state order." If they are standing  
12                  on that, so be it. If they are standing on the  
13                  ones that they've identified, quote, "with  
14                  certainty," we're okay with that. Tell us how  
15                  it would value. Give us the other information  
16                  required by the statute. And let's move for  
17                  summary judgment.

18                  In terms of how difficult this is,  
19                  this is a trade secret case. It is a little bit  
20                  like trying to make a glass of fresh-squeezed  
21                  orange juice and saying, well, it's kind of  
22                  difficult, we don't have any oranges, but we'll  
23                  do our best.

24                  This is a trade secrets case. If  
25                  they don't have trade secrets, they can't bring

1 the case. So far, all they have given us are  
2 documents which don't even come close. And they  
3 haven't withdrawn their one million page  
4 designation. They haven't withdrawn their 577.

5 All we're saying to them is, give us  
6 your trade secrets. Give us the ones that the  
7 577 documents plus the 47 new ones you have  
8 added, we'll deal with those. Just give us the  
9 additional information. But we can't have an  
10 expert guessing at which of the million pages  
11 you're going to come up with next.

12 It is a clear example of -- this is  
13 why the sequencing that we've suggested is so  
14 right. If they don't have trade secrets, we  
15 don't have to deal with whether a sick man has  
16 to be deposed for another nine hours. We don't  
17 have to deal with whether we have difficult  
18 privilege issues.

19 If you don't have trade secrets, and  
20 all you've got are documents you have copied  
21 from the Internet, let's know it and let's move  
22 on so we can make this case simple and proceed.

23 MS. RICHEY: Let me understand the  
24 universe of trade secrets from the plaintiff.  
25 As I understand it from hearing Mr. Rosenthal,

1       there was a big -- I think you said hundreds of  
2       thousands of pages of documents listed. Then it  
3       went down to 587. And now it is 47.

4               Are these categories inclusive? In  
5       other words, is it the hundreds of thousands, or  
6       however many pages it is, plus 587, 47? Or how  
7       many exactly -- how much -- how many documents  
8       are we talking about at this point in terms of  
9       the specification and identification of trade  
10      secrets?

11             MS. BRIGGERMAN: So on December 1st  
12      we identified -- I actually thought it was more  
13      like 80 -- but they are discreet documents that  
14      are trade secrets. And so we stand on those  
15      trade secrets.

16             What I am saying is, that when our  
17      client's -- dozens of gigabytes of documents and  
18      data representing his entire career of work are  
19      stolen, we cannot say with certainty that we  
20      have identified every single one. We have gone  
21      through and done our best to identify with  
22      specificity those documents that we identified  
23      on December 1st and we stand with those.

24             Now, we reserve the right to  
25      supplement that if we come across something

1 during discovery.

2 MS. RICHEY: Of course. Of course.  
3 So of the documents that you know about, I think  
4 it is incumbent on the plaintiffs to review the  
5 documents you know about, and within those  
6 documents identify which the plaintiff contend  
7 are trade secrets.

8 Has that been done?

9 MS. BRIGGERMAN: Yes, that is the  
10 December 1st production that we made. It is a  
11 culled set of trade secrets.

12 MS. RICHEY: And that's the 47, or  
13 however many it is?

14 MS. BRIGGERMAN: Yeah. I apologize.  
15 My math isn't good. I was looking -- I think we  
16 listed it as attachment A to our motion, so it  
17 is those documents listed there, just for  
18 clarity.

19 MS. RICHEY: Okay. I've got that.  
20 All right.

21 Which motion to your response to --

22 MS. BRIGGERMAN: Oh, yes. Yes. It  
23 is the response to their motion to compel. And  
24 I counted more than 80, personally. But it is a  
25 discreet set of documents that are Mr. Azima's

1 trade secrets. And really important within  
2 that, are his Rolodex of created business  
3 contacts that he's developed over 50 years.

4 MS. RICHEY: Okay. That just gave me  
5 the Bates range, right? That was that  
6 Exhibit A. Yeah, I remember that.

7 MS. BRIGGERMAN: Yes.

8 MS. RICHEY: So that just gives me a  
9 Bates range.

10 MS. BRIGGERMAN: Well, they're  
11 individual documents. I believe it is a list.

12 MS. RICHEY: The only thing Exhibit A  
13 is, is Bates ranges. So it's -- yeah, that's  
14 all it is.

15 MS. BRIGGERMAN: Well, it's -- it is  
16 a list, and it goes on two pages, if I have the  
17 correct line, of individual documents.

18 MS. RICHEY: Yeah, I'm sorry. I said  
19 Bates ranges. I meant Bates -- yeah, it is  
20 Bates numbers. But -- yeah. Okay.

21 But is the plaintiff saying, this is  
22 the universe of trade secrets, this exhibit A,  
23 or does it include other things that have been  
24 produced earlier?

25 MS. BRIGGERMAN: So this is the set

1 of trade secrets. And I caveat that if we come  
2 across anything else in discovery, we --

3 MS. RICHEY: I understand.

4 MS. BRIGGERMAN: -- have the right to  
5 supplement.

6 MS. RICHEY: Absolutely. I  
7 understand.

8 Hang on one second, Mr. Rosenthal. I  
9 just want to make sure I understand what it is  
10 the plaintiff says it has identified.

11 And so Ms. Briggerman, again,  
12 Exhibit A, is that the plaintiff's most complete  
13 response to the question of identify with  
14 particularity the trade secrets?

15 MS. BRIGGERMAN: That is correct.

16 MS. RICHEY: And does that mean that  
17 the documents that were part of the hundreds of  
18 thousands and the 587 are now taken out of that  
19 category of being trade secrets or are you also  
20 including those documents?

21 MS. BRIGGERMAN: So we will withdraw  
22 those and we will go with this -- this list.  
23 This is a culled down list.

24 MS. RICHEY: Okay. All right. And  
25 so that -- you know, because it seems to me you

1 all have a different -- another issue which  
2 needs to be resolved, which is a lot of  
3 documents that are listed as confidential that  
4 may not be.

5 Now, again, I don't know if what was  
6 shown to me was an individual document or part  
7 of something else. But at any rate, that's not  
8 what you asked me to look at.

9 Okay. So Exhibit A, that's the  
10 universe of trade secrets.

11 And the defendants, I'm assuming you  
12 still take issue with what was listed on  
13 Exhibit A and maintain that those are not  
14 been -- are you saying they have not been  
15 identified with particularity or that you --  
16 just that they are trade secrets?

17 MR. ROSENTHAL: Well, if they take  
18 the position that a photograph of a container  
19 which they copied from the Internet is a trade  
20 secret, so be it. But do explain to us what is  
21 required under the law and required by our  
22 interrogatory and document requests; how is it  
23 your trade secret; how does it value; and what  
24 did you do to protect the secrecy of that  
25 photograph?



1                   And I think what we're going to hear  
2     at trial is, well, that's not really our trade  
3     secret. And so that's what we want to do at  
4     this point, is nail down what is your trade  
5     secret.

6                   Ms. Briggerman, if it's a picture of  
7     something that is on the Internet and it's not  
8     even a secret, then can you kind of tell us why  
9     you're labeling it as a trade secret? That's  
10    what our interrogatories and our document  
11    requests are getting at. We've got nothing.

12                  MS. RICHEY: So in connection with  
13    the discovery, I'm assuming that the defendant  
14    has proffered questions that ask the plaintiff  
15    to identify the trade secret with particularity,  
16    state the value, state all efforts maintained to  
17    keep it secret, all the things that are in  
18    chapter 66.

19                  I'm assuming you have got  
20    interrogatories for each of those points; is  
21    that correct?

22                  MR. ROSENTHAL: Correct. And they're  
23    in the Powerpoint. Both document requests and  
24    interrogatories go to each of those statutory  
25    outlines.

1 MS. RICHEY: All right. Okay. And  
2 is it your position that they've simply not  
3 answered those, or is it your position that you,  
4 having answered those, you don't believe they  
5 are trade secrets?

6 MR. ROSENTHAL: Oh, I clearly don't  
7 believe they are trade secrets because they are  
8 publicly available photographs in most cases or  
9 documents from third parties.

10 However, if they want to stand on  
11 that -- this is not a motion for summary  
12 judgment, this is a discovery motion -- give us  
13 the basis for your allegation it is a trade  
14 secret. Tell us, as you're required to do in  
15 answering an interrogatory, what you did to  
16 maintain it a secret, why is it your trade  
17 secret, and why would it have value if it was  
18 posted on the Internet, despite the fact that  
19 that is where it came from?

20 MS. RICHEY: And so with respect to  
21 my role, you're right, that if -- you certainly  
22 have the right to ask that question in  
23 discovery. And it sounds like you have asked  
24 that question.

25 But have you asked about efforts to

1 keep secret, et cetera, all those elements?

2 MR. ROSENTHAL: Absolutely. And the  
3 interrogatories that we cited in the PowerPoint.

4 MS. RICHEY: Okay. And have those  
5 interrogatories been answered? Whether you  
6 agree with the answer or not, have they been  
7 answered?

8 MR. ROSENTHAL: No, they have not.

9 MS. BRIGGERMAN: Okay. So just to  
10 clarify, we did respond to the interrogatory. I  
11 don't think it's been updated since we further  
12 identified the trade secrets on December 1st.

13 MS. RICHEY: Okay.

14 MS. BRIGGERMAN: I'm happy to do  
15 that.

16 MS. RICHEY: Okay. Let me --

17 MR. BRANCH: And not to jump over  
18 Sam, but I will note that the plaintiff's  
19 objections were waived to the interrogatories  
20 because they were not -- the responses were not  
21 served timely.

22 MR. ROSENTHAL: Nor has there been  
23 any -- nor has there been any information  
24 addressing what was required, just the  
25 objections.

1 MS. RICHEY: So let's do -- what I  
2 want to do on this issue is this. As I have  
3 asked the plaintiff on the first two motions, to  
4 provide me with the exact discovery requests  
5 that were asked and what the answers and  
6 objections were. I'd like to have that in  
7 connection with the trade secrets from the  
8 defendants.

9 And I'd like to -- the defendants to  
10 tell me which responses they believe to be  
11 inadequate.

12 Now, on that, I don't think -- the  
13 question I'm asking is not do you believe it is  
14 a trade secret. My question is, have they  
15 adequately responded to the discovery.

16 I know that you're going to have some  
17 issues about whether or not you believe them to  
18 be trade secrets. That's a separate issue from  
19 what we are talking about right now.

20 MR. ROSENTHAL: We agree with that.

21 MS. RICHEY: Okay.

22 MS. BRIGGERMAN: And if I may add,  
23 Ms. Richey, the interrogatory they proposed is  
24 far too strict of a standard. It's not the  
25 appropriate standard. It may be one for summary

1 judgment or trial. But I believe they requested  
2 that we ascribe a particular value to each trade  
3 secret, and that's not what is called for under  
4 the case laws.

5 MS. RICHEY: Well, I think the  
6 question would be -- and I haven't seen the  
7 interrogatory -- if it is a properly posed  
8 interrogatory, it doesn't necessarily have to  
9 come directly out of the statute for it to be a  
10 relevant inquiry. But point that out.

11 And we'll go through the process in a  
12 minute of how I'm going to let you all respond  
13 to each other on this -- these points. But I do  
14 need that information. And I think what I can  
15 help with is determining whether in fact the  
16 plaintiff has or has not properly responded, and  
17 then whether it should.

18 As I view the case law, it is  
19 absolutely clear in North Carolina that a  
20 plaintiff in a trade secret case must identify  
21 trade secrets with sufficient particularity for  
22 two reasons. One, it allows the defendant to  
23 know how to defend the case. And secondly, it  
24 helps the Court determine issues of relevancy in  
25 discovery. So it is an appropriate question.

1                   What I don't know and I think about,  
2                   is whether -- well, I don't think we need to get  
3                   to that right now. But for now, it is incumbent  
4                   upon the plaintiff to respond to the discovery.  
5                   And you'll send that to me and I'll decide  
6                   whether it's been responded to or not. And then  
7                   the issue of whether there's disagreement about  
8                   if something is or isn't a trade secret to me,  
9                   that's not in front of me right now.

10                  Okay.

11                  MR. ROSENTHAL: We do have the  
12                  lingering problem of the expert, though. And  
13                  that is --

14                  MS. RICHEY: Yeah.

15                  MR. ROSENTHAL: -- get an expert to  
16                  testify --

17                  MS. RICHEY: I understand. Right.  
18                  And so what I would like to do when we're done  
19                  is, I want to go through the schedule of  
20                  upcoming deadlines and make sure that we're in  
21                  line to meet those deadlines. I recognize  
22                  you've got that expert issue coming up pretty  
23                  soon.

24                  Okay. All right. Anything else on  
25                  the trade secrets? And then I want to move to

1 the deposition.

2 Okay. Madam Court Reporter, it's a  
3 little after 5:00. Are you okay to hang around  
4 for a bit? We had said 3:00 to 5:00 on this  
5 hearing.

6 THE COURT REPORTER: Yes, I'm fine.

7 MS. RICHEY: Okay. Thank you.

8 All right. So then I want to hear  
9 first from the plaintiff on the motion to compel  
10 the deposition, an additional deposition, the  
11 emergency deposition of Mr. Del Rosso. I did  
12 read the information that the plaintiffs sent  
13 over at noon. Thank you for getting that on  
14 short notice. I know that was difficult with  
15 the doctor always, but certainly on a holiday  
16 weekend. And it was helpful to see what he had  
17 to say. And it was helpful to see what he had  
18 to say.

19 One of the questions I have at the  
20 beginning is, I'm a little unclear, Plaintiff,  
21 as to what you all are seeking from  
22 Mr. Del Rosso.

23 That is, are you seeking him to  
24 answer specific questions? Are you seeking a  
25 full day deposition? Are you seeking a partial

1 deposition? I also want to know the status of  
2 the February 7th deposition. That might be  
3 something we'll resolve in here today.

4 But I wasn't clear when you asked for  
5 the emergency deposition whether you were  
6 seeking more videotaped discovery deposition,  
7 whether you were, in fact, seeking a trial  
8 deposition that would allow the defendants to  
9 cross -- to redirect, rather, direct their own  
10 witness, et cetera. I just want to make sure I  
11 know what it is you're seeking. And you can get  
12 to that in your argument, but those are my  
13 initial --

14 MS. BRIGGERMAN: Sure. And yes, to  
15 clarify, what we are seeking is to take  
16 Mr. Del Rosso's trial testimony in the form of a  
17 deposition, both in his personal capacity as a  
18 fact witness, but also as a corporate  
19 representative for VMS. Presumably, he is the  
20 designated representative for VMS, so he would  
21 be the one to testify in that capacity.

22 And the reason for needing this  
23 deposition to preserve his testimony for trial,  
24 is it is very clear that he is dying. And his  
25 health has taken a significant turn for the



1 worse as of November. Unfortunately, we were  
2 not apprised of that information until right  
3 before his rescheduled deposition. And then he  
4 sat for that deposition in December.

5 Right before the deposition, the day  
6 before, he changed his meds and increased the  
7 meds, such that his counsel advised at the  
8 deposition that he was not competent to testify.  
9 He gave some testimony that was lucid at times  
10 and some where he appeared very sleepy and under  
11 the influence of drugs.

12 But we were -- the fact that they did  
13 not inform us of his situation was very  
14 concerning, because they have told us since last  
15 year when they brought a motion before the Court  
16 to prevent his deposition, that they would keep  
17 us apprised of the situation and they have not  
18 done so.

19 But it is very clear they are still  
20 relying on the November 30th doctor's letter  
21 that says that the cancer has come back, that it  
22 is aggressive, and that he doesn't have long to  
23 live. So our concern is that he may not be  
24 available for trial, and that would  
25 substantially prejudice us.

1 I think in the alternative, I would  
2 say it is unclear what defendants' position is.  
3 Is he competent? Is he not? I still am not  
4 convinced from the doctor's note or their filing  
5 as to whether they say he is competent to  
6 testify at a deposition or not.

7 But it is clear that his December  
8 deposition was not a full deposition. We were  
9 entitled to three hours based on the Court's  
10 order. He appeared. He was clearly sleepy and  
11 unable to testify, and so that should not count  
12 as part of his fact witness deposition.

13 MS. RICHEY: Okay. Who is going to  
14 talk on behalf of the defendant?

15 MR. NEUMAN: Thank you, your Honor.  
16 I'll address that.

17 Right off the bat, I have got to  
18 address what is now another misrepresentation.  
19 I mean, Mr. Del Rosso did not medicate himself  
20 prior to that deposition. He was prescribed  
21 increased pain medications by his chief  
22 oncologist, okay, around the time that that  
23 deposition occurred because of the pain that he  
24 was in. He simply followed his doctor's  
25 instructions.

1 I want to make it very clear that  
2 there was no action on his own behalf to  
3 manipulate his condition prior to that  
4 deposition. His doctor and his pain management  
5 physicians would support that statement. So I  
6 just want to make that clear right off the bat.

7 We have been transparent about his  
8 health from the very beginning. We let them  
9 know very early on when he was first diagnosed  
10 with cancer that he was suffering from cancer  
11 when the case started to activate again. We  
12 have done our best to keep in touch with our  
13 client and our client's doctor, chief  
14 oncologist, who you can see from the letters  
15 we've established a good chain of communication  
16 to make sure that we have his availability to  
17 provide information when necessary.

18 We need to reframe, really, what  
19 we're looking at here. We have got a client who  
20 is suffering from a serious disease, right,  
21 causing him a great deal of pain and causing him  
22 the need to undergo a bunch of different  
23 treatments. One of which resulted in a pretty  
24 good period of time of remission.

25 When he came out of remission, nobody

1     kept information from -- he didn't keep  
2     information from us. We didn't keep any  
3     information away from counsel. He was trying to  
4     evaluate what was occurring when he started to  
5     have pain again, increased pain. He was always  
6     in pain, but there was increased pain.

7             He scheduled appointments  
8     immediately. He was waiting for evaluation from  
9     his doctors, which is pretty serious stuff. He  
10    has got to go through PET scans and things to  
11    determine, really, what was going on. Right?  
12    And it all happened pretty close in time to when  
13    the deposition occurred.

14            Notwithstanding his pain and the  
15    things that he is going through, he has sat for  
16    two depositions in three separate sessions.  
17    Even getting him to the deposition was  
18    excruciating the last time around, but we did.  
19    And he appeared and he did his very best.

20            What is critical to point out about  
21    the last deposition is plaintiff's counsel was  
22    fully informed about the nature of his condition  
23    prior to that deposition occurring, yet they  
24    pushed it. They pushed it to the point where we  
25    had to file a motion for Protective Order, which

1 was denied by Judge Osteen. We don't believe  
2 that Judge Osteen contemplated yet there would  
3 be more deposition testimony by giving  
4 plaintiffs the opportunity to move forward with  
5 the deposition, even in light of his condition,  
6 the pain he was suffering, the medications he  
7 was on, and a letter from his doctor that we put  
8 into the record prior to that deposition  
9 occurring.

10 So they shouldn't get another bite at  
11 the apple. This is essentially another bite at  
12 the apple. They have taken video depositions of  
13 him on three separate occasions.

14 We now have his doctor a second time  
15 in a letter saying, he's unlikely to be  
16 unavailable to testify by the time this trial is  
17 currently scheduled in September. There is  
18 nobody in his healthcare world who is saying he  
19 is going to be not with us immediately.

20 I interviewed him myself as part of  
21 this process, okay, prior to this hearing, to  
22 determine what his own belief is about what he  
23 has been told. And he said the same thing. He  
24 has been told that the regimen that he's on,  
25 radiation and chemo that's happening right now,

1     should buy him another -- more time, and  
2     hopefully buy him another remission. But either  
3     way, it could be as much as two years, right,  
4     according to what he has been told.

5                 So this is not an emergency  
6     situation. It is akin to another bite at the  
7     apple to take more deposition testimony of  
8     somebody who is in -- who's already gone out of  
9     his way to be deposed in difficult circumstances  
10    and provide as much testimony as he can possibly  
11    give.

12                Then we get this unilaterally noticed  
13    30(b)(6) deposition for February 7th. Right?  
14    Which, if you look at the topic areas, well,  
15    this is going to be addressed separately. They  
16    are going to completely overlap with questions  
17    that he has already been asked and testimony  
18    that he has already given in oral testimony, on  
19    video, and in witness statements.

20                We don't even think that there is a  
21    need for it, based on the circumstances. But  
22    we'll address that separately with counsel,  
23    whether that is going to go forward and when it  
24    is going to go forward.

25                So our position here is, there is no

1     need for a trial deposition right now.  
2     Discovery is ongoing. What makes this very  
3     unique, usually when an emergency trial  
4     deposition is requested, there hasn't been any  
5     prior testimony. None. There has been no  
6     record testimony. And the argument is, this is  
7     our shot, because we have somebody who is dying  
8     and may not be around by the time of trial.  
9     Okay?

10                 Our facts here are completely  
11     different than that. We have somebody that's  
12     been deposed, twice in three separate settings.  
13     We have somebody whose doctors are saying, yes,  
14     he has cancer, but he is being treated and  
15     highly unlikely -- highly unlikely -- that he  
16     won't be able at the time of trial to give  
17     testimony.

18                 So none of the facts here support  
19     this need for not only another deposition,  
20     another piled-on deposition, but an emergency  
21     trial deposition, where we're going to have to  
22     subject him to essentially direct examination  
23     and cross examination, right, and he is likely  
24     going to be available to appear at trial anyway  
25     after all of this.

1                   So we have to really look at what  
2                   we're dealing with here. We're not dealing with  
3                   an emergency situation. As counsel, we have a  
4                   duty to immediately pick up the phone and call  
5                   our opposing counsel and inform the Court if our  
6                   client takes a turn for the worse and make him  
7                   available for essentially a de bene esse  
8                   deposition.

9                   Okay. We understand that duty and we  
10                  understand that obligation as officers of the  
11                  court. And we will absolutely comply with that  
12                  obligation. And we're in touch with him. And  
13                  we're closely communicating, not only with our  
14                  client but with his doctors. So we're getting  
15                  information from independent experts on his  
16                  situation.

17                  So this is completely unnecessary.  
18                  And I would argue that borderlines inhumane and  
19                  harassing, given that he has already been  
20                  deposed. So I would ask that, you know, we move  
21                  on and conduct discovery in the normal course,  
22                  not under some made-up, emergency circumstances.

23                  MS. BRIGGERMAN: Ms. Richey, may I  
24                  respond to some of Mr. Newman's points?

25                  MS. RICHEY: You may.



1 MS. BRIGGERMAN: So this is not a  
2 third bite at the apple. Unfortunately, this is  
3 all Mr. Del Rosso's doing. We first noticed his  
4 deposition in December of 2022. He sought to  
5 delay that deposition because he was undergoing  
6 treatment. The court agreed to a short delay,  
7 but made it very clear that any future requests  
8 to delay the deposition would not be treated  
9 timely unless there was sufficient medical  
10 information to support it.

11 We went forward in February. And to  
12 accommodate the situation, the deposition was  
13 scheduled across two days so that he could sit  
14 for a couple of hours each day. Unfortunately,  
15 he refused to answer substantive questions.

16 In July, Judge Webster ruled that his  
17 refusal to answer questions was improper and  
18 that he needed to sit for the deposition again.  
19 We agreed with opposing counsel to set a  
20 deposition for three hours, even though  
21 Judge Webster did not put a time limit on that  
22 deposition.

23 So we attempted to depose him again  
24 in December. Again, opposing counsel sought to  
25 delay that deposition. The court ruled that it

1     should go forward. When he showed up that day,  
2     he appeared groggy and out of it. He was able  
3     to answer some questions and not others. But in  
4     our view, that deposition was not a completion  
5     of the deposition that the Court ordered to be  
6     completed.

7                 So there's -- I want to dissuade the  
8     special master of any argument that this is  
9     three bites at the Apple. It's been one  
10    deposition that we sought to complete for some  
11    time now, and Mr. Del Rosso has not been able to  
12    do it.

13                We have not yet had the 30(b)(6)  
14    deposition that is noticed for February 7th.  
15    Again, the Court, in July, ruled that that  
16    should go forward and ruled that the 30(b)(6)  
17    topics were relevant.

18                If Mr. Neuman is saying that that  
19    deposition is not going to happen, then that's  
20    concerning to us because we are ready to move  
21    forward with it.

22                MS. RICHEY: Okay. In the December  
23    deposition, and I was looking back  
24    at Judge Webster's order, was it the  
25    understanding that the only thing that could be

1 asked were the questions for which he refused to  
2 answer or was it broader than that? You  
3 mentioned that in the first deposition there  
4 were questions he refused to answer,  
5 therefore --

6 MS. BRIGGERMAN: Correct.

7 MS. RICHEY: -- so you had an  
8 opportunity to redepose him.

9 MS. BRIGGERMAN: Yeah. I think -- I  
10 mean it is hard to say how that would really  
11 work. How, if you ask one question, is it  
12 something he has already answered if it is  
13 phrased differently? I mean, I --

14 MS. RICHEY: Yeah. I don't mean the  
15 exact questions, but was that the construct and  
16 the reason why it was three hours, there were  
17 certain topics he had refused to go into?

18 MS. BRIGGERMAN: Correct. Both on  
19 relevance and privilege grounds.

20 MS. RICHEY: And at the deposition in  
21 December, I know that there were times he was  
22 not able to answer. Were there also objections  
23 asserted to those questions and was he prevented  
24 from answering anything by objection or was it  
25 just the medical situation that was the

1 difficulty?

2 MS. BRIGGERMAN: It was the medical  
3 situation, if I recall directly. I don't think  
4 the parties had reached any agreement as to what  
5 the scope was for that deposition. We had  
6 agreed to three hours.

7 MR. NEUMAN: And I will say, just to  
8 add, that the large majority of the refusal not  
9 to answer was upon counsel's instruction based  
10 on privilege and work product, the same  
11 privilege and work product that we discussed  
12 earlier regarding RAK's privilege.

13 The point I want to make -- and I'm  
14 happy to answer any questions, of course. I  
15 think it is important to understand that we've  
16 never said that Mr. Del Rosso shouldn't be  
17 deposed, all right. All we've said is, let's  
18 get him through treatment and have him deposed  
19 so we can provide testimony. That was our  
20 messaging before the December 7th deposition,  
21 yet they took him as he was.

22 It is an important theme here. They  
23 took him as he was that day. All right. They  
24 took him in the condition that he was in. We  
25 were not saying you will never get to depose

1 Mr. Del Rosso that day. We were saying he is  
2 going through treatment and let's make sure he  
3 is in a condition where he can provide adequate  
4 testimony.

5 So, you know, this isn't strategic by  
6 any means. This business of difficulty in  
7 scheduling his deposition, I understand all of  
8 that. It has been difficult. And we don't  
9 dispute that, that it has been difficult. It's  
10 been difficult because of something out of our  
11 client's control.

12 But any way you look at it, what they  
13 are essentially asking here for is a death bed  
14 deposition. That is what a de bene esse  
15 deposition is by its nature. Okay. It  
16 contemplates somebody who is sitting in a  
17 hospital bed in hospice with days, weeks to go.  
18 Right? That's what the purpose of this is. It  
19 is an extreme remedy that is appropriate under  
20 certain circumstances.

21 We are not under those circumstances  
22 in our current situation. There are no facts  
23 supporting an emergency de bene deposition. We  
24 have evidence from his doctor contrary to that.  
25 Right? So I just don't think we need it. I

1 don't think it is necessary.

2 MS. RICHEY: So as I read the  
3 January 15th letter from Dr. Rubinstein, I  
4 looked at the November 30th one, but I think  
5 that's old news and most in respects. He says  
6 that in three months we will -- he is very  
7 likely to enter a meaningful period of disease  
8 control, which we should find out about this in  
9 around three months.

10 It seems to me with respect to a de  
11 bene esse deposition, it is too soon to know  
12 whether we are there or not. And it seems to me  
13 that in the three months when they are able to  
14 do more imaging and see how the cancer has  
15 progressed or hopefully not progressed that  
16 might be the time to consider a de bene esse  
17 deposition. So I'm going to put that aside for  
18 the moment.

19 I think the current question is can  
20 he sit for a deposition and be competent to  
21 answer the questions that were asked in the  
22 December deposition? That deposition, did it  
23 last for three hours?

24 MS. BRIGGERMAN: It did not last  
25 three hours. And a lot of it was -- was

1       frankly, it was clear he was not capable. And  
2       in fact, his counsel said that he was  
3       incompetent.

4               MS. RICHEY: How long was that?

5               MS. BRIGGERMAN: I want to say it was  
6       under two hours of taped testimony at the most.

7               MS. RICHEY: Okay.

8               MR. ROSENTHAL: I believe it was two  
9       and-a-half hours.

10              MS. RICHEY: Okay.

11              MS. BRIGGERMAN: Again, a lot of that  
12       was unfortunately wasted time.

13              MS. RICHEY: So the doctor also says  
14       he should not be asked to sit for periods of  
15       time in excess of three hours. I'm not inclined  
16       to make this man sit for more than three hours.  
17       I also am questioning the need for another full  
18       day 30(b)(6) plus the three hours. And it seems  
19       to me there ought to be a way to come up with a  
20       solution where he is deposed and he can finish  
21       answering the questions that have to do with his  
22       personal knowledge and be asked his questions as  
23       a representative of the VMS that doesn't require  
24       ten more hours of deposition.

25              The problem that the plaintiff has

1 is, he is going to be on medication. And at  
2 some point, the plaintiff is going to have to  
3 decide whether it makes sense to take his  
4 deposition or if they take his deposition, to  
5 get what they can get -- get what you can get  
6 from it. And then later on, if it is handed to  
7 a jury, that jury will decide whether he was  
8 competent to answer the questions.

9 But he is in active cancer treatment.  
10 He is on pain meds. I'm again looking at the  
11 sentence that the doctor says, "He should not be  
12 asked to sit for periods of time in excess of  
13 three hours." And maybe that's our guidepost,  
14 that under no circumstances will a deposition  
15 last more than three hours. It might need to be  
16 broken up.

17 But it also seems to me that another  
18 full day of deposition for both the 30(b)(6) and  
19 the additional questions that he wasn't able to  
20 answer in December should be sufficient, given  
21 that he is the member of VMS who was taking  
22 action. And everything he did as far as I  
23 understood -- tell me if I'm wrong, Plaintiff --  
24 is that all the steps that he allegedly took and  
25 that he is alleged to have taken in the



1 complaint he did as a representative of VMS.

2 And so what I'm wondering is, if it  
3 can be arranged that he has another deposition,  
4 but it is three hours one day, maybe three hours  
5 the next week, maybe we kind of work through  
6 that. But that it is not another ten hours.

7 And then I think the plaintiff is  
8 going to have to decide whether you want to wait  
9 and see what happens in three months and if he  
10 is actually in a period of disease control such  
11 that he doesn't have to be medicated so heavily.  
12 It is important that his deposition is taken.  
13 It is important that he is fully able to answer  
14 questions, that his testimony is competent. And  
15 the plaintiff is entitled to take the 30(b)(6)  
16 and entitled to complete his deposition. But I  
17 do think that has to be weighed with the reality  
18 of where he is now in his treatment.

19 The doctor is not saying he is about  
20 to die. I don't think -- I do not think this is  
21 the situation where a de bene esse deposition is  
22 warranted. I do think it is a situation where a  
23 discovery deposition needs to be completed or at  
24 least an effort in that regard. And I think,  
25 Plaintiff, the challenged ledge you have is

1       when.

2                       And do you want it to go forward now,  
3       when he is in active treatment and taking pain  
4       meds or do you want to wait?  If you're going to  
5       wait three months, then we're going to have to,  
6       you know, talk to the judge about a discovery  
7       extension and you may not want to wait that  
8       long.

9                       But the doctor says he can sit for  
10       three hours.  And so maybe, what I'd like to do  
11       is have the doctor know his deposition is going  
12       to be taken on this day for three hours, and  
13       that he is appropriately medicated.  Because it  
14       is -- I agree, it is not right to ask him to be  
15       in terrible pain just to have a deposition  
16       taken.  But I don't hear the doctor saying he  
17       can't be deposed.

18                      In fact, he is saying he can sit for  
19       periods of time in excess of three hours.  
20       And -- but that's where he is.  I mean, the man  
21       is getting chemotherapy treatment and it is  
22       happening now.  It certainly can't stop.  And I  
23       don't know, frankly, the correlation between the  
24       therapy and the pain.  It sounds like the  
25       therapy is there to treat the pain and

1 perhaps it is going to be lessened after -- has  
2 he completed the radiation, does anyone know?

3 MR. NEUMAN: Yeah, he completed a  
4 full round of radiation and went right into  
5 chemo after that. So that the nature of his  
6 cancer, I'm told, is that you can't just do a  
7 blood test to determine whether or not the chemo  
8 radiation is working. You have to do a PET  
9 scan. And you don't get tumor reduction  
10 reactions until the, you know, the 90-day mark  
11 is when it really starts to take effect, and  
12 that's why the doctor is saying it takes that  
13 long to determine where he is at that point.

14 The point of it is, the pain is  
15 caused by the size of the tumors in the  
16 locations that they are.

17 MS. RICHEY: Right.

18 MR. NEUMAN: So the point of this --  
19 part of the plan is to reduce the -- you know,  
20 the size of the tumors so he can be without as  
21 much pain.

22 MS. RICHEY: So the doctor's  
23 November 30 letter said that they were arranging  
24 radiation therapy to treat his 12th rib lesion,  
25 which will accelerate relief of pain. And that

1 would occur for five days starting after that  
2 deposition in December.

3 So has that therapy helped with his  
4 pain?

5 MR. NEUMAN: It hasn't helped with  
6 pain as much as they expected it would be. And  
7 that's why they accelerated right into  
8 chemotherapy. And the original plan for chemo  
9 was to do three weeks on and then a period of  
10 time off to see how it adjusted. And now they  
11 have converted it to no periods of down time.  
12 They are just going to run it right up until  
13 they're ready to do a PET scan to determine  
14 whether it's had any positive effect, which they  
15 are expecting it to.

16 MS. RICHEY: So do you know whether  
17 his pain, though, has improved such that he  
18 could sit for a deposition and not have to be  
19 quite as drugged up as he was in December?

20 MR. NEUMAN: So they have been able  
21 to balance his medication -- and part of  
22 palliative care, is when you -- they run you  
23 right up to the maximum so you can manage it,  
24 and then they back you off pain, what I'm told,  
25 as time goes on.

1                   So they've -- he is on a -- he is on  
2                   a lower dose combination of the medications --  
3                   same medications he is still on, but a lower  
4                   dosage time and different time frames than he  
5                   was on the day of the deposition.

6                   So I guess the answer to your  
7                   question is yes, the medication has been  
8                   balanced and more regulated so he can function  
9                   better. Certainly, according to his doctor,  
10                  doesn't alleviate the natural somewhat cognitive  
11                  issues that come from that. But what I'm told  
12                  is, they are regulated at this point to the  
13                  point it is not as extreme as what he was  
14                  experiencing on the 7th.

15                  MS. RICHEY: And do you know whether  
16                  he does better in the morning or the afternoon?

17                  MR. NEUMAN: I do not. And I can --  
18                  I can inquire about that.

19                  MS. RICHEY: Yeah, I think what I'm  
20                  inclined to do is direct that he be deposed  
21                  again, but that the deposition, the 30(b)(6) and  
22                  the rest of the personal, be combined into two,  
23                  three-hour chunks one day -- and you'll have to  
24                  help us with this, Counsel for the defendants  
25                  that is.

1                   Is it better for him to do  
2                   three hours one day, three hours the next, or  
3                   does he need a day for recovery? And I know,  
4                   Plaintiff, that puts you in a situation that no  
5                   lawyer likes, which is a deposition is broken  
6                   up. But I think we have to recognize the  
7                   reality of what you're dealing with here.

8                   And I would say a three hours of one  
9                   sitting and a three hour another session, and  
10                  work with his doctor to determine whether that's  
11                  best in the morning, the afternoon, how much of  
12                  a break he needs in between.

13                  And that deposition would be a joint  
14                  30(b)(6) and the rest of the personal.

15                  I feel like that should give  
16                  sufficient time, given that he is both the  
17                  company and the individual. It is not as if he  
18                  has got to talk to five or six other people to  
19                  get the information.

20                  I know you all -- somebody mentioned  
21                  it, but I don't think I have seen the topics,  
22                  the 30(b)(6) topics. They exist? They have  
23                  been sent out?

24                  MS. BRIGGERMAN: Yes. Yes. And the  
25                  deposition is currently set for February 7. The

1 30(b)(6) is really important. Obviously, it is  
2 important that the plaintiff get a full  
3 seven hours in a deposition. And I understand  
4 the reality of the situation. But another  
5 alternative, of course, is for him, just like  
6 any other 30(b)(6) situation, to get someone  
7 else up to speed. His wife was also an employee  
8 of the company.

9 MR. NEUMAN: There isn't anybody  
10 else. We have inquired deeply into that. There  
11 is nobody else to designate for this particular  
12 deposition.

13 You know, and I'll say about the  
14 topics -- and this is for a different day -- but  
15 I just want to preview. I mean, they are overly  
16 broad. They implicate privilege and work  
17 product, same stuff we've been talking about  
18 here. And so we intend to address that in the  
19 next couple of days. And I guess what we'll do  
20 is reboot objections that we'll serve when the  
21 30(b)(6) was first noticed a while ago and meet  
22 and confer and deal with that.

23 But there is so much overlap in what  
24 he's been asked already. And we're going to run  
25 into the same objections, same situations, where

1 we sit right now. And, you know, I appreciate  
2 the accommodations and I really appreciate the  
3 sensitivity to this. And, you know, we  
4 understand the need to give discovery. We  
5 understand the need to be deposed. But this  
6 feels like a pile on, given what he is dealing  
7 with.

8 MS. RICHEY: Well, one of the things  
9 you don't want to happen in the deposition is  
10 for time to be taken up by objections. So if  
11 there's anything we can do in advance of that to  
12 mitigate, I'd want to do that because I do think  
13 the plaintiff should be allowed to get actual  
14 testimony during the time it has and not have it  
15 be spent with any arguments about objections.

16 So if those objections include  
17 privileged areas, seems to me those can be  
18 resolved in advance. If it involves relevancy  
19 and scope, you know, you know the rules. I mean  
20 they are entitled to ask and relevancy issues  
21 can come up later. But I don't want to have a  
22 lot of argument at the deposition on those kinds  
23 of topics if we can avoid that.

24 MR. NEUMAN: Yeah, the big ticket  
25 item is privilege. I think we're past the



1 scope. I mean, proportionality is always an  
2 issue. But I think meeting and conferring on  
3 the topics in their notice that we believe  
4 implicate privilege, we're happy to address  
5 those in good faith meeting and conferring  
6 prior.

7 MS. RICHEY: I think you should. I  
8 think that you all should endeavor to do that.  
9 I think there are two completing interests. The  
10 plaintiff is entitled to depose the defendant.  
11 That's the rules that's the way it goes. The  
12 defendant is very ill. I have great sympathy  
13 for that. And we have got to make these two  
14 things work together as best we can.

15 MR. NEUMAN: Understood.

16 MS. RICHEY: So I think if the  
17 parties could meet and confer and mitigate as  
18 many of these issues as you can in advance of  
19 the deposition, if there are any of these that  
20 you need me to resolve, please bring them to me,  
21 but talk first.

22 MR. ROSENTHAL: Just one thing that  
23 was said. Ms. Briggerman mentioned  
24 February 7th. There is a conflict. We are  
25 trying, all counsel, oral argument in another

1 case, and so I think there is a conflict on the  
2 7th. We will work with the plaintiff if there  
3 is a deposition on a mutually agreeable date.  
4 We're not going to use that as a delay, but the  
5 7th, I don't think, is going to work.

6 MS. BRIGGERMAN: That's actually --  
7 that is not the case. I don't think that  
8 that -- yeah.

9 MR. BEHRE: That's not the case.  
10 It's definitely been rejected, the 7th. There  
11 is no conflict, Sam; you know that.

12 MR. ROSENTHAL: Let me explain. Let  
13 me explain.

14 MR. BEHRE: You do know that.

15 MR. ROSENTHAL: There is only one day  
16 that all counsel can appear for an oral argument  
17 in the Southern District of New York, and it is  
18 February the 8th. Mr. Behre has indicated he  
19 will not agree to that date because the  
20 deposition of Mr. Del Rosso is on the 7th. So  
21 we're happy to work with him and do the  
22 deposition on the 9th, the 10th, whatever date,  
23 you know, works. But if there is only one day  
24 in the next month that all counsel can appear  
25 for an oral argument in the Southern District,

1 we shouldn't use Mr. Del Rosso's deposition to  
2 avoid that. That's all.

3 We'll work with you, Kirby, on a  
4 mutually agreeable date. We will.

5 MS. RICHEY: Well, you all talk about  
6 it. And if you can't come to an agreement and  
7 you need me to intervene on that, do.

8 MR. ROSENTHAL: Okay.

9 MS. BRIGGERMAN: What is essential is  
10 that this deposition needs to take place soon.  
11 We've noticed it for the 7th. This was  
12 previously noticed a year ago. And the Court  
13 in -- on July 25th ruled that the 30(b)(6)  
14 topics were relevant and any privilege  
15 assertions were conclusory and they needed to be  
16 made at the deposition.

17 We ordered that deposition to take  
18 place in August. It did not occur. Time is of  
19 the essence. Fact discovery closes in March.  
20 We really need to move forward soon.

21 MR. ROSENTHAL: And may I remind you  
22 that Mr. Azima has refused to be deposed for  
23 four months now.

24 MS. BRIGGERMAN: That is not correct.

25 MS. RICHEY: Let's stop that so --

1 because that's not in front of me. So I want to  
2 go back and talk about what we're going to do  
3 next.

4 Because I do agree, Ms. Briggerman --  
5 and I think everyone does -- that we have got a  
6 lot of deadlines coming up and a lot of things  
7 have to happen.

8 On your deadlines, your expert  
9 reports are due when? Is that still  
10 February 9th? Or have they been moved.

11 MS. BRIGGERMAN: It is, although I'm  
12 not -- at this point, I'm not sure how that is  
13 going to happen with fact discovery still going  
14 on. We still have depositions.

15 MS. RICHEY: Well, I guess -- right.  
16 And fact discovery is supposed to close  
17 March 29th, and then all discovery April 29th.  
18 Dispositive motions in May. That's an  
19 aggressive schedule. I don't have any marching  
20 orders and I can't change it, so we have to  
21 operate as if that's going to happen.

22 I would say this. If you all have  
23 any desire or intention to seek moving those  
24 deadlines -- I'm not suggesting you should -- I  
25 think that will likely go over better with the

1 Court if the Court sees progress and that things  
2 are moving forward.

3 So let's go back and talk about what  
4 you all are going to get to me. With respect to  
5 the documents that the plaintiffs maintain the  
6 defendants have not produced or the discovery,  
7 you're going to get me those discovery  
8 responses. You're going to get me the questions  
9 and the responses, including any objections.  
10 Today is Tuesday.

11 Do you think you can get those to me  
12 by the end of the day tomorrow?

13 MS. BRIGGERMAN: Yes, we can do that.

14 MS. RICHEY: And then, Defendant,  
15 with respect to the trade secret discovery, can  
16 you do the same? That is, get me the specific  
17 requests, the answers, objections, so I can  
18 determine whether any orders need to be made  
19 about those?

20 MR. ROSENTHAL: Absolutely.

21 MS. RICHEY: Okay. Also, by the end  
22 of the day tomorrow? Listen, I'm still you. I  
23 don't want to give you work you can't do, but  
24 this case is hopefully a priority.

25 So end of the day tomorrow still work

1 for everybody?

2 MR. ROSENTHAL: Yes, I think it does.

3 MS. RICHEY: Okay. All right. On  
4 the laptop, I'm going to -- I'll put this in a  
5 written document, but I'm going to direct  
6 Mr. Del Rosso and VMS to, in essence, direct  
7 their counsel in the UK. I'll look at what  
8 Mr. Grant sent me, which was the UK documents,  
9 to pursue the process that was set forward in  
10 the UK order and to report back about the status  
11 of that. I'll put that in a document. Because  
12 I want to understand when we can get a copy of  
13 this laptop.

14 I would like him also to ask his  
15 counsel if a copy of the laptop can be provided  
16 just to Mr. Del Rosso. Not anyone else. And  
17 then, obviously, you would have a forensic  
18 person look at that and pull out all of the  
19 documents, just so it can be done. The answer  
20 may be no, but I think it's worth --

21 I'm sorry?

22 MR. BRANCH: I'm sorry. I had  
23 something blow up on my computer. I apologize.

24 MS. RICHEY: Oh, okay.

25 And then the privilege. So I would

1     like to understand what the case law says about  
2     my ability -- or rather about RAK's ability to  
3     assert the privilege through Mr. Del Rosso. And  
4     there may be nothing better out there than what  
5     you have provided. Just look and tell me.

6                     And then my understanding was that  
7     the plaintiff is going to go through the  
8     privilege log and identify which documents you  
9     believe the privilege was improperly asserted.  
10    Really, it is going to be a combination of the  
11    documents you think you want to see and you're  
12    contesting the privilege. And then we'll figure  
13    out whether it makes sense for me to review  
14    those documents.

15                    MS. BRIGGERMAN: Sure. And would you  
16    like us to do that with the entire privilege  
17    log? It is 90 pages. And we're happy to do it  
18    once. Or alternatively, we could pull up  
19    samples because you might see an e-mail chain,  
20    for example, that has the same subject line ten  
21    times and it's follow-on is the same. So  
22    whatever is going to be easiest for you.

23                    MS. RICHEY: I don't know, having not  
24    seen the documents. But, you know, at some  
25    point, if there is going to be any inspection of

1 the documents, you'll have to proffer those  
2 exact documents to me. And obviously there  
3 might be duplications. I mean, if you can de  
4 dupe things, that's always great. That makes it  
5 quicker. I'll have to leave that up to you.

6 MS. BRIGGERMAN: Okay.

7 MS. RICHEY: When we were talking  
8 about the privilege -- and I think there was a  
9 deposition of Rick Garcia, who is he?

10 MS. BRIGGERMAN: He was with NTI.

11 MS. RICHEY: He's with NTI.

12 Does that deposition and the fact  
13 that now the defendants know that that  
14 information was turned over to the FBI, does  
15 that cause you to change the privilege log at  
16 all, Mr. Branch?

17 MR. BRANCH: It may. We're trying to  
18 figure out -- so we don't have the transcript,  
19 first of all. Secondly, we're doing due  
20 diligence on some of the things that Mr. Garcia  
21 testified about. So I hesitate to say with  
22 ironclad certainty that it will, but his  
23 testimony will have some impact, I would  
24 imagine, on the way that we have asserted that  
25 some things are privileged.



1 I would anticipate that we continue  
2 to contend that the work product protection  
3 applies to reports, even if they were turned  
4 over to the FBI. But we're -- I mean, frankly,  
5 we're trying to figure out exactly what happened  
6 at this point.

7 MS. BRIGGERMAN: And that transcript  
8 is available now. It is just the rough, but it  
9 has come out, John.

10 MR. BRANCH: If you would  
11 appreciate -- we weren't sent a copy of it. So  
12 if you all would appreciate circulating --

13 MS. BRIGGERMAN: Sure.

14 MR. BRANCH: -- that would be very  
15 helpful. Thank you very much.

16 MS. RICHEY: Okay. Let's put some  
17 time frame around the privilege issues. So the  
18 things that I need are some case law. I need to  
19 know what is the universe of privileged  
20 documents. And specifically, the documents that  
21 plaintiff would like to get, because plaintiff  
22 would maintain that the privilege is improperly  
23 asserted. If you have the transcript and if you  
24 think that transcript might change that  
25 privilege log, then that needs to happen pretty

1 quickly.

2 And so how soon do you think you all  
3 could look through the transcript and then make  
4 any changes to the privilege log. And let me --  
5 before we go there, there was also, looking at  
6 the Dechert documents that were produced in the  
7 UK, that may or may not change the privilege  
8 log.

9 MR. BRANCH: The challenge that I  
10 think we have is, that defendants in this case  
11 are not in control of some of the information  
12 that would be determinative of how the privilege  
13 log would change.

14 The testimony at issue is Mr. Garcia,  
15 who was the former FBI -- head of the FBI  
16 offices for the LA offices and the Houston  
17 office, when he went out into private business,  
18 he testified that as part of his work for NTI,  
19 as a contractor for Dechert, he interfaced with  
20 the FBI after his team had identified what they  
21 believe were violations of Title 18 of the U.S.  
22 Code. And in connection with his interface with  
23 the FBI, he turned over what he called are  
24 reports that NTI generated.

25 Defendant's position in the

1 litigation is that all of these reports are  
2 privileged and work product. I was not aware  
3 until Mr. Garcia's deposition that the reports  
4 had been turned over to the FBI.

5 And he was unable at his  
6 deposition -- he knew that some reports had been  
7 turned over and some reports hadn't, but he  
8 wasn't really able to describe with any  
9 specificity the reports that he says he turned  
10 over. And we're in the process of trying to  
11 figure out if that can be done right now.

12 MS. RICHEY: He wasn't able to  
13 describe, who, Mr. Garcia?

14 MR. BRANCH: Mr. Garcia was not able  
15 to describe with specificity which reports  
16 because there are --

17 MS. RICHEY: I see.

18 MR. BRANCH: Because we've logged the  
19 reports, right, the reports are all over the  
20 privilege logs. And -- but he was not able to  
21 describe, you know, for example a report that  
22 says blah, blah, blah went over to the FBI. I  
23 mean, so there is -- and frankly, our clients  
24 weren't involved in that -- VMS was not involved  
25 in handing off the reports to the FBI.

1                   So we're working on that, with the  
2                   understanding that there could be some impact on  
3                   the privilege designations. I believe that a  
4                   series of demand letters have gone out from  
5                   plaintiff's counsel over this over the last  
6                   several days as well.

7                   MS. RICHEY: Well, it may be that  
8                   that's -- we'll just have to set that aside and  
9                   you might not be able to modify or don't even  
10                  know if you can modify the privilege log. So I  
11                  think for now, if you can, do. If you can't,  
12                  plaintiff will just need to look at what you  
13                  have set out.

14                 MR. BRANCH: We -- you know, the way  
15                 we're looking at this, ma'am, is we have new  
16                 information. We're doing due diligence on the  
17                 new information. If the due diligence causes  
18                 the assertions that we've based privileged  
19                 designations on the change, we will change the  
20                 privilege log accordingly. We just -- we are  
21                 not in the position to jump the gun without  
22                 accurate information at this point.

23                 MR. NEUMAN: We also need to do some  
24                 research to determine whether the work product  
25                 protection flows, even though it was turned

1 over.

2 MS. RICHEY: Right. So it may be  
3 that that just can't be done, but we do need to  
4 move forward.

5 Okay. so with respect to getting me  
6 some law around the assertion of the privilege,  
7 when can you all do that? Could that be done  
8 this week, earlier this week? I don't -- again,  
9 I don't want to give you more than you can do,  
10 but it is Tuesday. The reason I want to look at  
11 that is, I just want to understand the threshold  
12 issue of whether or not you can even assert the  
13 privilege. And then assuming I get past that  
14 and determine, yes, you can, then I would like  
15 to have -- go ahead and have the plaintiff be  
16 looking through the privilege log, and coming up  
17 and being able to tell me, Here are the  
18 documents we want you to review.

19 MS. BRIGGERMAN: Yeah, we can  
20 absolutely do that this week.

21 Shall we say COD Thursday?

22 MR. BRANCH: That is consistent with  
23 what I was thinking.

24 MS. BRIGGERMAN: And, Ms. Richey,  
25 would you like a short statement of the case

1 law, like a 700 word statement as we have been  
2 doing? Or how would you like it?

3 MS. RICHEY: I'll leave that to you.  
4 I mean, you know, if it is just a couple of  
5 cases, I can read those. But if you want to  
6 summarize them, that's fine too. I won't  
7 object.

8 All right. Okay. Let me just make  
9 sure. So tomorrow are the -- okay. In  
10 connection with the deposition, I would like you  
11 all to confer.

12 Do we want to go ahead and set a time  
13 for that to happen so that there is no dispute  
14 about that? Do you want to look at your  
15 calendars and come up with a time to have a  
16 conversation about when the deposition can be  
17 taken? I don't need to be part of that  
18 conversation, but if we can get that on the  
19 calendar, I think that would be useful.

20 MR. NEUMAN: Sure. How about,  
21 Lauren, if it's okay with you, we will retreat  
22 tonight, look at the calendars, and why don't we  
23 touch base tomorrow about setting a meeting  
24 confer time?

25 MS. BRIGGERMAN: Yeah, yeah, we're

1 happy to do it tomorrow.

2 MS. RICHEY: Okay. If there's -- if  
3 you all can't come up with a time to meet and  
4 confer by the end of the day tomorrow -- I don't  
5 mean you meet and confer tomorrow -- I mean, if  
6 you haven't agreed on a time by the end of the  
7 day tomorrow, then you all let me know and we'll  
8 get together and have a brief conference and see  
9 if we can't -- I'm happy to be part of that, but  
10 I just want to make sure it happens.

11 MR. NEUMAN: Yeah, we'll absolutely  
12 get that nailed down. We're going to need a  
13 little bit of time to go through the topics,  
14 Lauren, so we can have a -- again, go through  
15 the topics and have a meaningful conversation  
16 about that.

17 The one thing I wanted to maybe ask,  
18 I guess, or offer for conversation, Ms. Richey,  
19 is the thing that has gummed up the depositions  
20 in the past have been privileged objections and  
21 instructions not to answer, which are entirely  
22 based on -- or a large majority based on our  
23 instruction from RAK to protect their privilege.  
24 So we have been put in a position when a  
25 question is asked, right, that implicates that

1 privilege, we're in a tough position. We have  
2 to instruct our own client not to answer.

3 Those privilege issues have not been  
4 worked through yet. So in order to have a  
5 meaningful deposition or a client in the future  
6 along the sort of parameters that you have set  
7 out about the timing and everything, we strongly  
8 believe it makes sense to get through the  
9 privilege issues. Right? Get determination on  
10 the privilege issues one way or the other so we  
11 can then go forward with the deposition, either  
12 allowed to continue to assert instructions not  
13 to answer and protect the privilege and work  
14 product or not. That changes the way the  
15 depositions go.

16 So I would just put it out there for  
17 discussion that, you know, in light of our -- we  
18 know that it needs to be -- there needs to be a  
19 deposition. We know that we need to offer  
20 discovery. But we want to do it in a way that's  
21 meaningful so we don't spend, you know,  
22 three hours of the six, or whatever it is he is  
23 going to be deposed, talking about objections as  
24 opposed to --

25 MS. RICHEY: Yeah, I agree. Let me



1 ask you this. If I determined that privilege  
2 didn't apply to documents A, B, C, whatever they  
3 are, and everyone accepted that. I know you all  
4 have the right to go to Judge Osteen. Whether  
5 you did or didn't, but that was the final  
6 conclusion, are you and your client comfortable  
7 revealing that information or would you, at that  
8 point, want to get RAK -- tell RAK and RAK might  
9 say, Well, we're going to intervene. In other  
10 words, if you're asserting it, are you also able  
11 to have him answer questions if the  
12 determination is made that they're not  
13 privileged?

14 MR. NEUMAN: So it is a great  
15 question. As I sit right now, I need to think  
16 through that, but I think we would have to get  
17 RAK involved in it as we have all along.  
18 Because their position is, it is their  
19 documents. It is their privilege that is being  
20 protected. And so I think there would be a  
21 process that would flow from that.

22 MS. RICHEY: Okay. And that's my  
23 concern too, you know, given who RAK is and that  
24 they have got strong opinions about this, as no  
25 doubt they should.

1                   What I would like to know, then, is,  
2                   and we're looking at the case law, my assumption  
3                   would be, if the Court says, you may assert a  
4                   third-party's privilege objection, then it also  
5                   means that if the Court says that privilege  
6                   objection does not apply, then you have to  
7                   answer the question. You can't view -- I don't  
8                   mean you, personally -- I mean the party can't  
9                   say, Oh, no, wait a minute, this third party has  
10                  to intervene, that you're in it fully on behalf  
11                  of RAK.

12                  If your position is different from  
13                  that, I think we need to talk about requiring an  
14                  intervention. So I want you to think that  
15                  through. Because if that's the case, I don't  
16                  think we wait on that topic -- on that issue,  
17                  because that's simply going to cause more delay.  
18                  And that would be -- what I would do, then, is  
19                  go and talk to Judge Osteen about it.

20                  MR. NEUMAN: Understood. I  
21                  appreciate that. And, you know, the distinction  
22                  on privilege has deeper implications because we  
23                  have Dechert as a third party in this particular  
24                  case. They have asserted objections based on  
25                  privilege. And there is a 30(b)(6) deposition

1 of Dechert coming up at some point, I think near  
2 the end of February. So, you know, I don't know  
3 if we need their participation in it as well, in  
4 this whole privilege decision, because they are  
5 asserting the privileges on behalf of RAK.

6 MS. RICHEY: The privilege log, the  
7 99-page privilege log, does that include Dechert  
8 documents?

9 MS. BRIGGERMAN: No. They have their  
10 own extremely long privilege log as well. And  
11 this is the reason that we feel that RAK needs  
12 to intervene now. If they are the ones holding  
13 the privilege, they need to assert it, and they  
14 need to live with the rulings on it.

15 MS. RICHEY: Well, I think the  
16 question is, if either me or Judge Osteen  
17 or Judge Webster says the privilege doesn't  
18 apply to this document, but the plaintiff's --  
19 I'm sorry -- the defendants' position is still,  
20 We still can't answer that question because RAK  
21 is telling us not to, in that case, it would  
22 seem to me that RAK should intervene.

23 And so I guess, counsel for  
24 defendants, I'd like you to consider that and  
25 get back to me, say, by the end of the day

1 Thursday, if you think you can do that. I don't  
2 know if that requires you to talk to RAK or just  
3 to convene among yourselves to decide if that's  
4 the position you're going to take.

5 And if that is the case, I do think  
6 we need to talk about intervention. Because it  
7 sounds like that is going to hold up a lot if we  
8 can't actually -- it makes no sense to take his  
9 deposition if he is not going to be able to  
10 respond to questions on privilege that either me  
11 or Judge Webster or Judge Osteen determines  
12 doesn't apply.

13 MR. NEUMAN: That makes sense. We'll  
14 confer on that pretty quickly internally. It's  
15 probably going to require us to go to RAK and  
16 have a discussion. Because, you know, I assume  
17 what their response is going to be, No, we're  
18 still holding privilege. And we're just going  
19 to have to figure out how to deal with that  
20 situation.

21 MS. RICHEY: You know, I think the  
22 answer will be, then, that you have to  
23 intervene. In other words, if they are  
24 directing you -- not you personally -- but  
25 directing your client not to abide by a court

1 order, they need to intervene. Otherwise, I  
2 don't know how your client can -- if I make a  
3 decision and that decision becomes binding  
4 because no one appeals it to Judge Osteen -- or  
5 even if they do and Judge Osteen enters an order  
6 and that order says there is no privilege on  
7 this document, then when your client's in a  
8 deposition, he has got to respond.

9 And if RAK is going to tell them, You  
10 can't, then I think it behooves everybody --  
11 particularly, your client -- for RAK to  
12 intervene and take the heat on that and --

13 MR. NEUMAN: Understood.

14 MS. RICHEY: Okay. So I think if you  
15 come back and say we can't -- we're still  
16 subject to RAK's direction on this, I think  
17 we're at a position where RAK probably ought to  
18 intervene. Or RAK would -- if RAK doesn't want  
19 to intervene, then RAK would need to say --  
20 however that happens, but you would need to tell  
21 me if there is a decision that this document or  
22 documents are not subject to privilege, then the  
23 client will testify about this and we will  
24 produce them. In other words, that you're free  
25 of RAK's direction.

1 MR. NEUMAN: Understood.

2 MS. RICHEY: I see that you're in a  
3 tough situation.

4 Okay. So you all are going to  
5 confer. I would like if -- this week is --  
6 we're on -- given what needs to happen before a  
7 meet and confer, and given that we don't know  
8 privilege, we won't know all of the answers to  
9 the privilege answers right away, do you think  
10 you all could meet and confer by the end of the  
11 day on Monday the 22nd and come up with some  
12 dates for deposition? It would be two dates,  
13 three hours and three hours?

14 MR. NEUMAN: Sure, we can do that.

15 MS. RICHEY: Okay. And then also, at  
16 the same time of that meet and confer, talk  
17 about the topics and see if you can agree on --  
18 what you can agree to on the topics. If there  
19 are things that can be resolved before the  
20 deposition, I would like to try to resolve them.

21 And then meantime, if I hear from you  
22 all by the end of the day on Thursday, did I  
23 say? I think that was right. About getting up  
24 with RAK, and the response is we can't, we have  
25 to do what RAK says, then I think I should

1       probably let Judge Osteen know that we might  
2       need to deal with an intervention pretty  
3       quickly.

4                       Does RAK have U.S. counsel? I saw  
5       the one letter from --

6                       MR. NEUMAN: It does, yeah.

7                       MS. RICHEY: That was that firm. I  
8       can't remember -- it wasn't a firm I was  
9       familiar with.

10                      But that's still their counsel?

11                      MR. NEUMAN: Yes.

12                      MS. RICHEY: That letter?

13                      MR. NEUMAN: Yes.

14                      MS. RICHEY: Okay. Well, then I will  
15       presume you're in contact with that counsel.

16                      MR. NEUMAN: That's who I will  
17       contact about this, yeah. And I'll do my best  
18       to get a response from them. It's also going to  
19       be - hinge upon what some of the case law says,  
20       too. If RAK takes the position and we can  
21       support it by case law that intervention is not  
22       necessary or not required in order to protect  
23       privilege, that changes the dynamic a bit too.  
24       That goes hand in hand with the research we'll  
25       do prior to that.

1 MS. RICHEY: Right. But I do think  
2 if that is true, if you're allowed to assert the  
3 privilege, then it also seems to me that that  
4 means that your client has to abide by whatever  
5 the Court says about that privilege. And you  
6 might decide -- and I'm just -- you didn't say  
7 this, I am -- you might decide you need some  
8 cover on that, and you might want RAK to  
9 intervene for that reason. I'll let you make  
10 that call.

11 MR. NEUMAN: Understood.

12 MS. RICHEY: So I think the question  
13 I need to know is, is it the defendant's  
14 position that no matter what I say or the Court  
15 says -- and I don't want you to put this in  
16 writing necessarily. I don't want it to be some  
17 statement that your client is not going to abide  
18 by a court order, but maybe the decision is that  
19 RAK is the party that is going to ultimately be  
20 objecting to any decisions about privilege. And  
21 that is the answer, that in other words, RAK  
22 hasn't given your client full authority to make  
23 decisions on that, let me know.

24 I think I know what the answer will  
25 be, more than likely. And then I think we've



1 got to look at intervention. And I'll just have  
2 to talk to Judge Osteen about how that -- how  
3 that goes.

4 MR. NEUMAN: Okay. Appreciate that.

5 MS. RICHEY: Have I answered -- is  
6 there something I've missed? I feel like there  
7 is so many things we've talked about. Does  
8 everyone understand what's going on? I'm going  
9 to write something up, not a formal document  
10 just yet, but just sort of a scheduling thing.

11 Anything that I have missed that  
12 anyone has a question about?

13 MS. BRIGGERMAN: I don't think so.

14 MS. RICHEY: Okay. Let me just make  
15 a couple of comments. And I realize we've gone  
16 way over.

17 Thank you, Madam Court Reporter, for  
18 hanging in there.

19 We are all under tight time  
20 restrictions, you know, under the order that --  
21 the joint statement of agreement that you all  
22 came up with. I'm supposed to decide these  
23 things within a week. It is not a directive.  
24 It is aspirational, I know.

25 I think we'll move faster going

1 forward because I won't have to go back and read  
2 reams of documents to get up to speed since I  
3 now have a context that I didn't have until you  
4 all started sending me documents and I started  
5 reading. It would make it quicker going  
6 forward, though, if you want me to read -- like,  
7 in a couple of instances, somebody would provide  
8 me briefing from earlier motions. I've read  
9 everything you've asked me to read, and I will  
10 do that. But it might make it go quicker if you  
11 do that in the future to tell me what you want  
12 me to read in that brief, rather than the whole  
13 thing. Maybe you wanted me to read the whole  
14 thing.

15 It would also help in these motions  
16 if you're talking specifically about a failure  
17 to produce or respond to tell me the exact  
18 discovery question, the number, and then provide  
19 me with the answer. Just, it would make it go  
20 much faster.

21 I know that it has been a problematic  
22 case and it's been difficult to work together on  
23 it. I'm going to try ideally to help you all do  
24 that and make decisions where that can't be  
25 done.

1 I also want this to be efficient for  
2 your clients. And so every time I read  
3 something that's timed, I'm happy to spend the  
4 time, but I don't want to waste your client's  
5 money. So -- but if you give it to me to read,  
6 I'm going to read it. I have read everything  
7 you have given me to read. So that is all that  
8 I have.

9 Anything else from anybody?

10 Okay. Well, we're at 6:00. We're  
11 just a little over. Thanks everybody for your  
12 time today. And I'll send out an e-mail, if not  
13 later tonight, then first thing in the morning  
14 with what our next steps are and how we're going  
15 to proceed.

16 MR. NEUMAN: Thank you very much.

17 MS. BRIGGERMAN: Thank you,  
18 Ms. Richey.

19 MR. RAND: Thank you for your time  
20 this afternoon.

21 MS. RICHEY: Thanks, Madam Court  
22 Reporter.

23 (Time noted: 6:03 p.m.)  
24  
25

C E R T I F I C A T E

STATE OF NEW YORK )

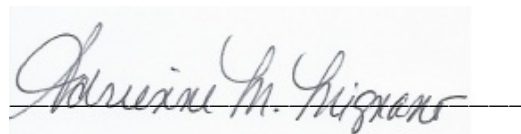
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COUNTY OF NEW YORK)

I, Adrienne M. Mignano, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify the within is a true and accurate transcript of the proceedings taken on January 16, 2024.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of January, 2024.

A handwritten signature in cursive script, reading "Adrienne M. Mignano", is written over a horizontal line.

ADRIENNE M. MIGNANO, RPR